2020

Transparency in the management of oil and gas blocks: a review of Kenya legislative framework

Sheila Nandako
Strathmore Law School (SLS)
Strathmore University

MASTER OF LAWS

TRANSPARENCY IN THE MANAGEMENT OF OIL AND GAS BLOCKS:

A REVIEW OF KENYA LEGISLATIVE FRAMEWORK

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE MASTER OF LAWS DEGREE (OIL AND GAS), FACULTY OF LAW, STRATHMORE UNIVERSITY

BY

NANDAKO SHEILA

STUDENT NO. 110361

JUNE, 2020

DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Nandako Sheila

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24/5/2020

Approval
The thesis of **Nandako Sheila** was reviewed and approved by the following:

Professor Damilola S. Oluwayi,

Dr John Ambani Osogo,
Senior Lecturer, Strathmore Law School,
Strathmore University

Dr Peter Kwenjera,
Dean, Strathmore Law School,
Strathmore University

Dr Bernard Shibwabo,
Director, Office of Graduate Studies,
Strathmore University

Nandako Sheila Student No. 110361

ACKNOWLEDGEMENT

I thank God for giving me the strength to carry out this research project to the end.

I am forever indebted to my family and friends for their prayers and support as I pursued my Master's degree coursework and in particular, this thesis. My gratitude also goes to my colleagues at work who in one way or another contributed towards the completion of this project. Moreover, I appreciate the patience and indulgence that my bosses showed me during this entire period. This I cannot take for granted.

I also wish to extend my gratitude to my supervisor, Prof. Damilola S. Olawuyi, who, despite the time constraints and a busy schedule, was gracious enough to provide guidance on this thesis until its completion. I am thankful for the input of Dr Melba K. Wassuna, Dr Ambani Osogo, Mohamed Ruwange and the defence panel chair who brought in a new perspective to this research. For this, I say, thank you.

May God bless you all!!

DEDICATION

I dedicate this project to my mother, Marie G. Masinde, who encouraged me to pursue a Master's degree and began the journey with me. Mum, I hope that I make you proud.

ABSTRACT

It is widely accepted that good governance and transparency in the extractive sector is the precursor to the realisation of economic and social growth. On the other hand technical and institutional flaws are a recipe for economic loss, resource curse or revenue leakage and low return.

Kenya, in the year 2019, made an overhaul of its energy and petroleum laws in line with the constitutional dictates and response to policy and legal reform. The changes present a significant departure from the former regime that was restrictive and fell short of the internationally accepted standards and best practices. This research therefore aims at contextualising the reforms that have been introduced by the new energy and petroleum laws in relation to discretion given to the Cabinet Secretary in licensing of oil and gas blocks.

In that regard, the research focuses on transparency in licensing, management and control of hydrocarbon blocks and hydrocarbon rights. Kenya's new hydrocarbon blocks licensing regime represents a shift towards competitive bidding through bidding rounds. However, the *Petroleum Act,* 2019 offers no criterion or the manner of conducting such bidding rounds. Further, the new law still leaves much of the powers and discretion in licensing of hydrocarbon blocks with the Cabinet Secretary in charge of Petroleum. Such power under section 10, 18 & 126 of the *Petroleum Act*, 2019, creates opacity which could potentially lead to conflict between the community and the IOC and/or the Government and create avenues or conducive medium for corruption which could lead to economic loss and revenue leakage.

The research therefore is premised on the view that having a transparent licensing regime on oil and gas blocks in a country diffuses avenues of corruption and potential conflict between the community and the IOC and/or the Government. Comparatively, to illustrate the potential for abuse in cases of weak governmental systems or flaws in a country's regulatory machinery, the research delves into the Nigerian case of Famfa Oil Limited. The case pits an indigenous Nigerian oil company Famfa Oil in the allocation of OPL 216 and its later conversion to OML 127 and the controversy over the "Back – in – rights" by the government. The research also borrows the comparative experience of Ghana as its legal regime is considered to be one of the few in Africa which has entrenched transparency and promoted accountability in the extractive industry and management of Hydrocarbon Rights.

In conclusion, the research recommends a raft of changes and security measures (safety valves) to cure the flaws that exist and persist in the current law. The study suggests that the powers of the Cabinet Secretary should be truncated to minimise the effect of the slippery slope that such arbitrary powers harbour. It also recommends the definition and introduction of a clear cut procedure for calling and conducting bidding rounds to breathe certainty into the system and promote transparency; proposes that in the absence of competitive bidding powers for direct negotiation be vested in an independent authority. The research, in addition, borrows the concept of "Back-in-rights" and encourages the Kenyan parliament to legislate on the same to allow the Kenyan Government to maximise benefits from the extractive industry.

LIST OF ABBREVIATIONS

ADHR	American Declaration of Human Rights
AG	Attorney General
ANCL	African Network of Constitutional Lawyers
AU	African Union
BIR	Back – in – Rights (Rule)
DECC	Department of Energy and Climate Change
E & P	Energy and Petroleum
EITI	Extractive Industries Transparency Initiative
eKLR	Electronic Kenya Law Reports
EPRA	Energy and Petroleum Regulatory Authority
EU	European Union
GDP	Gross Domestic Product
GNPC	Ghana National Petroleum Corporation
ICCPR	International Convention on Civil and Political Rights
IOC	International Oil Company
KETRACO	Kenya Electricity Transmission Company Limited
MER – UK	Maximising Economic Recovery in the United Kingdom
NFFAC	National Fossil Fuels Advisory Committee NFFAC
NNPC	Nigerian National Petroleum Corporation
NOCK	National Oil Corporation
NUPAC	National Upstream Petroleum Advisory Committee
OGA	Oil and Gas Authority

OML Oil Mining License

OPL Oil Prospecting License

SC Supreme Court

UDHR Universal Declaration of Human Rights

LIST OF LEGAL INSTRUMENTS

Republic of Kenya

Access to Information Act, 2016

Anti-Corruption and Economic Crimes Act, 2003

Constitution of Kenya 1963 (Repealed)

Constitution of Kenya, 2010

Energy Act, 2019

Environmental Management Coordination Act, 1998

Ethics and Anti-Corruption Commission Act, 2011

Gazette Notice No. 3344 Dated 10th May 2016

Government Contracts Act, 1952

Mining Act, 2016

Official Secrets Act, Cap, 187.

Petroleum (Exploration, Development and Production) Act, 2019

Petroleum (Production and Exploration) Act, Cap 308

Republic of Nigeria

Constitution of the Federal Republic of Nigeria, 1999

Petroleum Act 2004 (Nigeria)

Petroleum Act, 1969 (Nigeria)

Republic of Ghana

Ghana National Petroleum Corporation Act, 1983

Ghanaian Constitution of 1992

Petroleum (Exploration and Production) Act, 2016 (Act 919)

Petroleum (Exploration and Production) Law, 1984 (PNDCL 84)

Petroleum Commission Act, 2011 (Act 821)

Petroleum Revenue Management Act, 2011 (Act 815)

Provisional National Defense Council (Establishment) Proclamation, 1981

United Kingdom of Great Britain and Northern Ireland

Companies Act of the UK, 2006

Data Protection Act, 1998.

Energy Act of the UK, 2016

Infrastructure Act, 2015

Offshore Petroleum Licensing (offshore Safety Directive) Regulations,

2015 *Petroleum (Transfer of Functions) Regulations*, 2016 *Petroleum Act*

of the United Kingdom, 1998, Cap 17

Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations, 2014

Petroleum Licensing (Exploration and Production) (Seaward and Landward Area) Regulations 2004

Petroleum Licensing (Production) (Seaward) Regulations, 2008

Scotland Act, 2016

Wales Act, 2017

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Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others [2016] eKLR

Boniface Mwangi v Inspector General of Police & 5 others [2017] eKLR

Christopher Ndarathi Murungaru v Standard Limited & 2 others, Civil No. 513 of 2011 [2012] eKLR

*Daniel Ngotiek Nchui & 3 others v National Oil Corporation of Kenya & anothe*r [2019] eKLR

Dennis Mogambi Mong'are v Attorney General & 3 others, Civil Appeal No. 123 of 2012 **[**2014] eKLR

Friends of Lake Turkana Trust v Attorney General & 2 others [2014] eKLR

Kenya Ports Authority v. East African Power and Lighting Company Limited (Civil Appeal No. 41 of 1982)

Lake Naivasha Friends of the Environment v Attorney General & 2 others [2012] eKLR

Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR

Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR

Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR

Nairobi Law Monthly Company v Kenya Electricity Generation Company & 2 Others [2013] eKLR

Njoya & 6 Others V Attorney-General and 3 Others, Misc. Civil Application No. 82 of 2004

Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] eKLR

Pharmaceutical Society of Kenya v National Assembly & 3 others [2017] eKLR

Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

Samuel Kimuchu Gichuru & another v Attorney General & 3 others [2015] eKLR

Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR

Water Resources Management Authority v Kensalt Limited [2014] eKLR

Water Resources Management Authority v Krystalline Salt Limited [2018] eKLR

Federal Republic of Nigeria

Akintokun v. LPDC (2014) 13 NWLR (pt. 1423) 1 at 91 *F.G.N*

v. Zebra Energy Ltd. (2002) 18 NWLR (Pt. 798) p. 162

Famfa Oil Limited v. Hon. Attorney-General of the Federation & Anor, (2007) 12 iLAW/CA/A/173/06

N.*N.P.C. V. Famfa Oil Ltd &ANOR* (SC 178/2008) [2009] NGSC 7 (Supreme Court)

NNPC v Famfa Oil Ltd (2012)17 NWLR (pt. 1328) 148 *NNPC v Famfa Oil*, (2012)

C.L.R. 5(a) (SC)

NNPC v. Famfa Oil Ltd (2012) 17 NWLR (pt 1328) 148

Ogulaji v. A.G. Rivers State (1997) 6 NWLR (Pt. 508) p. 209

UNTHMB v. Nnoli (1994) 5 NWLR (Pt. 363) p. 376

United States of America

McDonald v. HUMPHRIES, 1990 OK 51 (Okla. 1990)

Mengden v. Peninsula Prod Co., 544 S.W.2d 643-44 (Tex. 1976)

TABLE OF CONTENTS

CHAPTER ONE

General Overview and Outline

1.1 Background

This research aims at contextualising the reforms that have been introduced by the new energy and petroleum laws in relation to the discretion given to the Cabinet Secretary in charge of petroleum in licensing of oil and gas blocks. It focuses on transparency in licensing, management and control of hydrocarbon blocks and hydrocarbon rights. It further centres on the inadequacy of the *Petroleum Act*, 2019 to give a formula or procedure for conducting the bidding rounds.[1] Considerable analysis is also given to the fact that the Act vests considerable power on the Cabinet Secretary in charge of Petroleum. This concept brings to fore contemporary discussions on transparency and impartiality.[2]

Oil and gas are vital natural resources and are deemed to be public assets.[3] Therefore, they vest in the people of the Republic of Kenya who are the custodians of sovereign wealth and power.[4] Management of such wealth is however vested in the government of the Republic of Kenya as a trustee. The People, through a social contract, donate power to the government. However, in donating such power to the common trustee, the government, the people do not cede all power to make and implement all decisions.[5] They retain a residual control, crucial in ensuring that the country's resources are managed and utilised transparently and optimally. This residual power, is the basis for checks and balances.

On the other hand, whilst the government is managing such natural wealth and controlling it as a trustee for the people, the larger citizenry has a right to know what happens to their natural resources. The residual power in the people is instrumental and serves to ensure that the

[1] Section 18, *Petroleum Act*, 2019.
[2] See section 10, 18 & 126, Petroleum Act, 2019.
[3] Article 62 (1) (f), article 260, *Constitution of Kenya*, 2010 on the definition of natural resources;, Clause 41 (1); *Petroleum (Production and Exploration) Act*, Cap 308, Section 17.
[4] Article 62 (1) (f), *Constitution of Kenya*, 2010 classifies minerals as public land which is in turn held in trust for the Kenyan people by the government under article 62 (2) and (3).
[5] *Njoya & 6 Others v Attorney-General and 3 Others*, Misc. Civil Application No. 82 of 2004. The people are the constituent power and the sovereignty of the people is entrenched in the constitution.

country's resources are managed and utilised in a transparent manner.[6] In 2003, this residual power in the people inspired the formation of the Extractive Industries Transparency Initiative by international actors majorly to tackle the 'resource curse' problem.[7] The initiative was aimed at achieving transparency in the management of hydrocarbon rights. It basically requires all extractive companies operating within a nation's territory to disclose resource related payments made to the government. The government is in turn required to publish what it receives. These figures are then reconciled by an independent body drawing its membership from all sectors of the governance structure of a country's extractive industry.[8] This forms the crux of contract transparency and governance from the licensing of oil blocks to production contracts.

Historically, the management and exploration of petroleum has seen a general shift in contractual structures and agreements from concessions[9] to profit-sharing contracts.[10] The uniqueness of the oil and gas sector encompassing property rights, governmental trusteeship and contract is the justification for this shift.[11] In Kenya, since the discovery of oil by Tullow Oil, the focus has shifted to legal and policy framework in oil and petroleum. In light of that, Kenya has entered into petroleum agreements with international oil exploration companies and utilised profit sharing agreements to settle their relationships and govern their intercourse.[12]

Before the current energy and petroleum laws came into force, exploration of oil and gas in Kenya and the upstream sector was vested in the Ministry of Energy and Petroleum without an independent regulator.[13] The enactment of the *Petroleum Act*, 2019 and the *Energy Act*, 2019

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6 Standard Editorial, Resolve blockade in Turkana before it undermines oil find , The Standard Digital, 2nd July, 2018 at <https://www.standardmedia.co.ke/article/2001286285/resolve-blockade-in-turkana-before-it-undermines-oil-find> on 25th February, 2018.

[7] *Patricia Galvão Ferreira*, Extractive Industries Transparency Initiative (EITI): Using a Global Public-Private Partnership to Facilitate Domestic Governance

[8] *Patricia Galvão Ferreira*, Extractive Industries Transparency Initiative (EITI): Using a Global Public-Private Partnership to Facilitate Domestic Governance

[9] Telmage Hunt III E. T, 'Fiscal Aspects of Petroleum Exploration and Production Agreements', 37.: investor took title over the natural resources and paid royalties, rent and tax to the government

[10] Telmage Hunt III E. T, 'Fiscal Aspects of Petroleum Exploration and Production Agreements', 37.: the government retains title to the hydrocarbons and the investor receives a portion of the production as reimbursement of costs and of profit.

[11] Maxwell C. Richard, 'Oil and Gas Law and the End of its Great Era' in MacDonnell J. Lawrence and Bates F. Sarah (eds), *Natural Resources Policy and Law: Trends and Directions*, Island Press, Washington, D. C, 93 -123.

[12] Kenya Civil Society Platform on Oil and Gas Resources, Perspectives of the Civil Society, *The Kenya Civil Society Platform on Oil and Gas* (KCSPOG), 2014, 30

[13] Kenya Civil Society Platform on Oil and Gas Resources, Perspectives of the Civil Society, *The Kenya Civil Society Platform on Oil and Gas* (KCSPOG), 2014, 30

introduces the Energy and Petroleum Regulatory Authority (EPRA) with the power to issue non-exclusive petroleum exploration permits on a block among others.[14] There is also established under the Petroleum Act the National Upstream Petroleum Advisory Committee (NUPAC) to replace the National Fossil Fuels Advisory Committee (NFFAC) on a purely advisory role. [15] The new introductions posit the question as to whether the systems as layered in the said Acts are well placed to take care of the emerging dynamics of exploration and oil production in Kenya, enhancing management of mineral rights and governance of the collective resources of the people of Kenya.

Under the *Petroleum Act*, 2019, the Cabinet Secretary enters into petroleum exploration agreements, but the Energy and Petroleum Regulatory Authority grants the non-exclusive exploration permits to the oil companies on gazetted blocks.[16] The government may also engage itself directly in oil exploration through contracts with private or public companies expressing interest in upstream petroleum.[17] With private companies, the principal vehicle for such ventures is profit sharing agreements[18], which call for transparency in management for the betterment of society and the welfare of the people of Kenya. This invites an analysis of the system and its efficacy in managing hydrocarbon rights in Kenya.

In 2013, Kenya mooted and actualised the shift of her policy framework to competitive bidding (licensing round) in granting exploration blocks.[19] This shift was occasioned by a spirited move for transparency and entrenchment of best governance practices in governance of resources.[20] Section 18 of *Petroleum Act* 2019 now provides for competitive bidding to replace direct negotiations.[21] Under section 17 *Petroleum Act* 2019, where the National Government enters into

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[14]Sections 22, 23 and 24, *Petroleum Act*, 2019 gives the Energy and Petroleum Regulatory Authority the right to grant an exclusive exploration permit and operational permits to the applicants keen on prospecting or engaging in oil gas production/exploration as provided for in the Act.

[15]Section 12, *Petroleum Act*, 2019.

[16]Sections 10, 11, 12 and 13, *Petroleum Act*, 2019.

[17]The National Oil Corporation is fully owned by the government for purposes of oil exploration

[18]Kindiki Kithure, Synchronising Kenya's Energy Law with the Framework Environmental Law in Okidi C. O, Kameri – Mbote P., Akech Migai, *Environmental Governance in Kenya: Implementing the Framework Law*, East African Educational Publishers, Nairobi, 372 – 390.

19 Hubert Don, The Use of Tax Havens in the Ownership of Kenyan Petroleum Rights, Resource for Development Consulting, 2016, 9 <www.oxfam.org> 5th May, 2018.

[20]Melba K. Wasunna 'Kenya Transparency Scorecard; Transparency in Kenya's Extractive Sector', *Extractives Baraza*, 2017, Issue 1.

[21]Section 18 (5) (c), *Petroleum Act*, 2019

a petroleum agreement, it must be transparent and competitive.[22] Even though the move to include competitive bids by the *Petroleum Act, 2019*, is a step towards the right direction in increasing transparency; Having an independent oversight body like the Energy and Petroleum Authority to check the process of awarding oil and gas blocks limits avenues of corruption. It is key in averting potential conflict between the community and the IOC and/or Government. In Ghana, for instance, the *Petroleum (Exploration and Production) Act* provides for the baseline terms of the essential terms of a contract that must be present in a license/contract to oil prospecting firms. It also includes the minimum work requirements that a licensee must perform in order for its license to be renewed.[23] The Ghanaian Act also encompasses reporting standards on the findings and appraising the Petroleum Commission of Ghana on their activities as a way of promoting transparency.

1.2 Research problem

The need for an ideal framework in management of the natural resources of a country cannot be gainsaid. In Kenya, the provision under Section 18 (4) of the *Petroleum Act*, which obligates the Cabinet Secretary to publish a 30-day notice in the website, the Gazette and in two newspapers of nationwide circulation of intention to negotiate directly with a contractor, is a positive step in promoting transparency. However, transparency and accountability needs to have the backing of information and guarantees on its availability. Without information, transparency is of no utility, it is a mirage. Since the *Petroleum Act* does not provide for information disclosure on bids submitted be they responsive or unresponsive, there is potential for secrecy and selective disclosure. The *Petroleum Act* nonetheless does not wholly orient itself on strict bidding that promotes competition and transparency. It still provides instances where the Cabinet Secretary can negotiate directly.[24]The choice of direct negotiation is deemed to be a non-transparent process and therefore may bring about inefficiency.[25]

[22]Section 17 (1), *Petroleum Act*, 2019 provides that "where the national government enters into a petroleum agreement, under this Act, it shall do so fairly, equitably, transparently, competitively and cost effectively."
[23]*Petroleum (Exploration and Production) Act,* 2016, Section 23.
[24]Section 18 (3), *Petroleum Act*, 2019.
[25]Partick Bajari et al, 'Auctions versus Negotiations in Procurement: An Empirical Analysis' Vol. 25, No. 2, *Journal of Law, Economics & Organization* (2009) pp. 372 – 399.

The Cabinet Secretary has the power to make rules,[26] a factor that further aggravates the risk of abuse. Although the Cabinet Secretary only operates under the advice of the Energy and Petroleum Authority (EPRA),[27]section 10 (2) of the *Petroleum Act* 2019 provides that they may decline the recommendations of the authority with reasons in writing within fourteen (14) days. Auxiliary to that, Section 10 spells out the powers of the Cabinet Secretary, which are vast and influential. In such instances with vast extensive unchecked discretion, there arises potential avenues for corruption and conflict between the community and the IOC and/or Government.

The problem posited by the unchecked discretion Cabinet Secretary in charge of energy and petroleum enjoys in licensing of oil and gas blocks under section 10, 18 & 126 of the *Petroleum Act*, 2019 is that it in turn creates room for opacity. This, from the benefit of hindsight, could lead to conflict between the community and the IOC and/or the Government and create avenues for corruption resulting to economic loss and revenue leakage.

1.4 Research Objectives

This research paper has specific objectives which are as follows:-

Main Objective

The research aims at contextualising the reforms that have been introduced by the new energy and petroleum laws in Kenya in relation to the discretion given to the Cabinet Secretary in licensing of oil and gas blocks.

Specific Objectives

a) To analyse the viability and the prospects of having an independent regulator limit the potential for conflict of interest among agencies in the petroleum sector and avenues for corruption, revenue loss and leakage through checks and balances and severability of administrative decisions of various interdependent agencies.

[26]Section 126, *Petroleum Act*, 2019.
[27]Section 10, *Petroleum Act*, 2019.

b) To analyse and audit the discretion granted to the Cabinet Secretary in charge of petroleum on licensing of oil and gas blocks by the *Petroleum Act* under section 10, 18 & 126 and explore the latent danger of abuse *vis a vis* the experiences of other jurisdictions like Nigeria.

c) To access how a country can avoid sailing the avenues of corruption and conflict between the community and the IOC and/or the Government by entrenching a transparent licensing regime on oil and gas blocks in the country like Ghana did.

d) To provide suggestions for improving the system by identifying the flaws that exist.

1.5 Research Questions

In achieving the above-stated objectives, this research is guided by the following research questions:-

a) Does the discretion the Petroleum Act (under sections 10, 18 and 126) grants the Cabinet Secretary in charge of petroleum to license oil and gas blocks interfere with transparency and accountability?

b) Could this discretion lead to abuse of power?

c) How have comparable jurisdictions controlled the power of licencing oil and gas exploration?

1.6 Literature Review

Transparency and Access to Information

A myriad of scholarly writings on hydrocarbon rights world over leaves no doubt of the wealth of knowledge and literature available. The existence of such research notwithstanding, there is an apparent gap when it comes to a nation's specialised and technical know-how on its hydrocarbon realm. Despite advancements espoused in other jurisdictions, some budding potential oil producers have come to terms with how little or secretive information on hydrocarbon rights and management have happened to be. As Odote C observes, the public's access to information is a

principle that epitomises good governance in hydrocarbon structures and promotes the much-hallowed transparency.[28]

In *Friends of Lake Turkana Trust v Attorney General & 2 others,*[29] the litigants submitted before the honourable court that there is a growing international consensus flowing from the European Court of Justice in the case of *Guerra & others v Italy* which held that governments must collect and disseminate environmental information. The court went ahead to note that public participation which enhances transparency and accountability in the awarding of public resources will remain a mirage if the right to access information is not actualised and information made freely available.

Melba K. Wasunna on the other hand states that information plays a central role in transparency of the extractive industry and is vital in averting conflict and complications related to opacity.[30] She further observes that the Kenyan law in place currently is opaque and riddled with confidentiality clauses that make access to the terms of petroleum contracts complicated. She also observes that the *Petroleum (Exploration, Development and Production) Bill*, 2015 (now an Act) seeks to bridge the gap and cure the asymmetry that currently plagues the system on transparency and disclosure.[31]This is in agreement with the findings in the case of *Friends of Lake Turkana Trust v Attorney General & 2 others,*[32] which held that there could never be meaningful public participation by the citizens if there is no information that is the manure of an informed decision and fruitful public participation. The role that information access plays in promoting transparency cannot be gainsaid. The ugly overtones of opacity and secrecy are well known.

Art Durnev et al. in their treatise opine that sound property framework, information access, and corporate transparency are key towards development as they are a cure to the information

[28]Odote Collins, 'Access to Information Law in Kenya: Rationale and Policy Framework', *The Kenyan Section of the International Commission of Jurists (ICJ Kenya)*, 2015.
[29][2014] eKLR.
[30]Melba K. Wasunna, 'Improving access to Information in Kenya's Extractives Sector' *(Extractives Baraza, Policy Brief 01, March 2017)*.
[31]Melba K. Wasunna, Kenya Information Needs Assessment in the Extractives Sector (*Extractive Baraza – Strathmore University*) 14th February, 2017, 13.
[32][2014] eKLR.

asymmetry between key players.[33] This, in turn, promotes mutual agreements and locks out suspicion over the lack of some of the information necessary in decision making. Such transparency and good governance practices contribute to the creation of a system that is viable for investors looking to invest and have security in their investment.[34] This agrees with the accepted principles of negotiation and contract processes that eventually contribute to a cohesive system that is mindful of its players and stakeholders in general.

Damilola S. Olawuyi observes that the right to access information is sacrosanct, that the same has been enshrined in Article 19 of the International Convention on Civil and Political Rights (ICCPR), Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 13 of the American Declaration of Human Rights (ADHR).[35] This right has in turn been lauded as allowing individuals and communities to access information on government projects that would affect them either directly or indirectly. This access to information and the knowledge of the actions of governments and the activities of extractive firms have led to spirited efforts to improve environmental protection such as the Ogoni Case[36] and the Royal Dutch Shell Corporation in Nigeria.[37]Nigeria for example, in the process of reviewing its oil and gas legal framework to address the perennial problem of revenue leakage and opacity seeks to develop a viable legal framework for public participation and disclosure of information in the management of petroleum rights.[38]

In Kenya, the right to access information is enshrined in article 35 of the Constitution of Kenya, 2010. This right, as Mingcong accurately observes, is vital to the realisation of other rights and the realisation of different values and principles such as transparency, accountability and robust

[33]Durnev Art et al, Property Rights Protection, Corporate Transparency and Growth, 40/9 *Journal of International Business Studies*, 2009 pp.1533 – 1562.
[34]Cotula Lorenzo, 'Reshaping Contracts for Quality Natural Resource Investment', *International Institute for Environment and Development*, 2013.
[35]Olawuyi S. Damilola, The Principles of Nigerian Environmental Law, *AfeBabalola University Press*, 2015, 274 – 277.
[36]Olawuyi S. Damilola, The Principles of Nigerian Environmental Law, *AfeBabalola University Press*, 2015, 174 – 180.
[37]Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria. <http://www.cesr.org/text%20files/nigeria.PDF>26.1.2019.
[38]ChilenyeNwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' Vol. 54, No.2 *Journal of African Law* (2010) pp. 184 – 211.

tax collection structures.[39] It is critical in the achievement of the benefits and aspirations of Kenyans.

Allocation of Rights in the Oil and Gas Industry

In 2012, Kenya struck its first significant oil discovery in block 10BB and joined countries with oil producing potential after years of unsuccessful attempts. After the clamour and the oil discovery euphoria settled, attention shifted towards the lucrative oil blocks.[40] The discovery opened a scholarly debate on the process of bidding, allocation and relinquishment of oil blocks in Kenya. There are different approaches by different countries and systems on bidding, allocation and relinquishment of oil blocks. Silvana Tordo for instance groups allocation systems into (i) Open-door systems (Energy & Petroleum (E&P) where rights are allocated as a result of negotiation between the government and interested investors through solicited or unsolicited expression of interest) and; (ii) Licensing rounds.[41] She further identifies two types of licensing rounds: (i) Administrative procedures, in which E&P rights are allocated through an administrative adjudication process based on a set of criteria defined by the government; and (ii) Auctions, in which rights go to the highest bidder.[42]

Silvana Tordo further observes that in open-door systems, the criteria for award are often not pre-defined and known to market participants; the government retains considerable discretionary power and flexibility in awarding E&P rights.[43] This, like under the repealed Act in Kenya, creates the potential for abuse and is a precursor to unaccountability and opacity that in turn lead to revenue leakage and loss. This discretion as Cordaid Kenya observes at times alienates the communities and other key stakeholders as they feel left out of the process as it noted in its

[39]Mingcong L, 'Corruption, Transparency and the Resource Curse', 3 *International Journal of Social Science and Humanity*, November 2013.
[40]Cordaid Kenya, Oil Exploration in Kenya: Success Requires Consultation - Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya (Report) August, 2015, 22.
[41]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg 14
[42]SilvanaTordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg 14
[43]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg 14

August 2015 while quoting a community representative during a focus group discussion in Nakukulas, Turkana South that "Our Camel is being milked while we are watching".[44]

The discovery of oil opens new frontiers for intellectual arguments and dialogue on the various concepts in and around exploration development and production of petroleum and natural gas.[45]

When oil blocks are advertised, bidding floated and allocated in an open, transparent and competitive process; oil companies acquire rights in the blocks. These rights are however not exclusive, and the companies have to relinquish them in a defined fashion or upon expiry of a particular term. Oil companies can also farm out their interest in a specific oil block. Farm out as John S. Lowe observe the involvement of an arrangement between a company that holds drilling rights with a company keen on exploring oil in which the rights are given to the other company by way of a farm-out agreement.[46] Various scholars have now narrowed into the dynamics that surround the bidding, licensing and relinquishment of these rights as well as the attendant rights.[47]

David L. Goldwyn observes that the majority of the world's resource-rich countries are the most ineffective and corrupt. Such failure is attributed to bad governance and lack of transparency.[48] With the benefit of hindsight, developing countries have tried to entrench transparency and good governance into the extractive industry, especially in Africa and Latin America.[49] Transparency not only serves to afford the people who the mineral rights vest in but also helps to promote competitiveness among competing oil exploration firms.[50] The aim of transparency from such an

[44]Cordaid Kenya, Oil Exploration in Kenya: Success Requires Consultation - Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya (Report) August, 2015.
[45]Omolo W. Oiro Miriam, Wambu Germano (eds), A Premier to the Emerging Extractive Sector in Kenya: Resource Bliss, Dilemma or Curse, *Institute of Economic Affairs*, Nairobi, 2014.
[46]John S. Lowe, *Analyzing Oil and Gas Farmout Agreements*, 41 *South Western Law Journal* 759 (1987).
[47]Samuel Ochola Agonda, The Mineral and Oil Find in Kenya: Is it a Curse or a Blessing? In Tabitha Kirit-Ng'ang'a Jasper A. Okelo (Eds), Trade Disclosures in Kenya: Some Topical Issues (Vol. 2) *School of Economics, University of Nairobi*, 2014.
[48]Goldwyn L. David, Extracting Transparency, 5 *Georgetown Journal of International Affairs*, 2004, 5.
[49]Girones Ortega Enrique et al, Mineral Rights Cadastre: Promoting Transparent Access to Mineral Resources, *The International Bank for Reconstruction and Development/The World Bank*, Washington, 2009, 15.
[50]Jedrzej George Frynas, 'Corporate Social Responsibility and Societal Governance: Lessons from Transparency in the Oil and Gas Sector' 93/2 *Journal of Business Ethics*, 2010 163 – 179.

angle is to attract quality investors and support the development of the mineral sector and efficiency in licensing of mineral blocks to these firms.[51]

Many countries as observed by scholars, have multiple models of ceding and licensing rounds for oil prospective firms. In the Kenyan extractive industry, as earlier noted, such is done by way of gazetted blocks. The nature of tax or costs payable in the acquisition of the blocks or license to explore is based on a country's fiscal, regulatory and sector policy. [52] Such policies aim to raise revenue for the government and ensure adequate compensation for the use of the resources and the optimum utilisation of the same for sustainability.[53] Transparency in the management of oil blocks has always been a necessary intruder to ensure that the public voice their opinion and concerns in the extractive industry.[54] This research, therefore, seeks to analyse transparency in licensing, farming in and out in particular Ngamia 1, which was the first significant oil field in comparison with another relevant case of Famfa Oil Limited. This is crucial in understanding the level of transparency in licensing entrenched in the Kenyan system and analysing the most viable ways of filling in such gaps.

Noteworthy, this research was conducted with the knowledge that the award of Block 10 BB in which Ngamia 1 is located was done without much public awareness and it is only after the award that questions on how the block was allocated were raised.[55] Even so, as Jaindi Kisero observes, that although the Constitution of Kenya, 2010 requires parliamentary ratification for such sale or award of oil blocks, the law to operationalise it had not been passed. This anomaly is further buttressed by the public outcry within the Turkana region over the award of oil blocks. Several stakeholders lamented of not being involved in the decision making or the award of oil

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[51]Arakan Oil Watch, *Burma's Resource Curse: The Case for Revenue Transparency in Oil and Gas Sector*, 2012, 16 -26.

[52]Leiter C. Amanda, Fracking, Federalism and Private Governance, 39 *Harvard Environmental Law Review*, 2015, 107; Camp C. Eric, Oil and Gas Law, 46 *Texas Technology Law Review*, 2014, 827; S. Scott Gaille, 'Allocation of International Petroleum Licenses to National Oil Companies: Insights from the Coarse Theorem', 31 *Energy Law Journal*, 111 -124.

[53]Nwapi Chilenye, Enhancing the Effectiveness of Transparency in Extractive Resource Governance: A Nigerian Case Study, 7 *Law and Development Review*, 2014, 23 – 47.

[54]Cordaid, Oil Exploration in Kenya: Success Requires Consultation – Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya (2015 Report)

[55]*Jaindi Kisero, Minister's firm sold Turkana oil block for Sh800m,* Daily Nation, *Tuesday March 27 2012 at* <https://www.nation.co.ke/news/Minister-s-firm-sold-oil-block-for-Sh800m-/1056-1375036-1m9sbhz/index.html> *on 25th February, 2019.*

blocks.[56] This bespeaks absence of transparency and non – consultation in the process of bidding, award and relinquishment of oil blocks. Such issues have precipitated chaos and volatility to the extent of being compared to the next Niger Delta.[57]

1.7 Approach and Methodology

This research was undertaken through the doctrinal methodology. Moni Wekesa states that doctrinal research involves the analysis of existing legal rules, principles and doctrines[58]. This research further called to play the expository approach, which aims at the world's best practice on transparency in oil blocks management. This methodology will look at sources such as Books, Law Journals, Articles, Newspapers, Seminar, workshop & Conference Papers, Periodical Magazines, Compiled Reports, Lectures, Legal Dictionaries, Internet Usage, and related hydrocarbon instruments and Conventions.

A comparative analysis and case study was also employed as David Colliner argues that comparison is a fundamental tool of analysis[59]. Arend Lijpharts in his article '*Comparative Politics and Comparative Methods'* defines a comparative method as the analysis of a small number of cases, entailing at least two observations. The merit of this method, he argues, is that given inevitable scarcity of time, energy and financial resources, the intensive analysis of a few cases will be more promising than the superficial statistical analysis of many cases[60]. Research on the best practices and successive application in other jurisdictions were also essential in mapping the global interface and deciphering the viable agenda for Kenya to adopt in managing resources and mineral rights effectively at present and for future generations. More particularly, the Famfa Oil Limited case study, being a recent and notorious case study of management of oil and gas blocks, will come in handy in achieving the comparative approach and to further

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[56]Evelyne Njoroge, Turkana council raises a red flag on land deals, Capital Business, 30th March, 2012 at <https://www.capitalfm.co.ke/business/2012/03/turkana-council-raises-red-flag-on-land-deals/> on 25th February, 2019.

[57]Standard Editorial, Resolve blockade in Turkana before it undermines oil find , The Standard Digital, 2nd July, 2018 at <https://www.standardmedia.co.ke/article/2001286285/resolve-blockade-in-turkana-before-it-undermines-oil-find> on 25th February, 2018.

[58]Moni Wekesa, 'Research Methods for Lawyers and other Professionals' Sportslink Limited (2016), 15

[59]David Collier,"The comparative method" www.pilisci.berkeley.eds 1 February 2018.

[60]Arend.Lijpharts, Comparative Politics and Comparative Method: The American Political Science Review,vo.65,No.3(Sep.,1971) ,pp682 –693,

American Political Science Association www.dcpis.upf.edu 29 May 2019

appreciate international and global best practices in transparency and management of hydrocarbon blocks. The research will also draw lessons from the Republic of Ghana as it is considered advanced in enforcing transparency in management of its hydrocarbon rights.

1.8 Scope of the study

The research focused on the Kenyan legislative framework on management of oil blocks and a comparative case study with Niger Delta and best practices from Ghana. The scope of hydrocarbon rights management is broad; therefore, the study will narrow down to oil and gas rights management, particularly oil and gas blocks management with a view of transparency in licensing thereof. However, the outcome of the study will be a general representation of Kenya's current legislative framework on oil blocks management, transparency and other mineral rights in general.

1.9 Limitation of the study

This area of study has not been widely explored particularly in relation to the current petroleum and energy laws of Kenya. Therefore, most of the secondary data to be relied upon in the study are studies carried out in other countries. However, these experiences from other jurisdictions will be key in providing a comparative analysis with the Kenyan scenario.

1.10 Chapter Breakdown

Chapter one forms the introductory part of this thesis and lays the ground work. It lays a foundation for the research and gives the legal foundation for the problem question to be addressed through the study, being the inadequacy of the legal and policy framework in discussing the concept of contract transparency and governance in oil blocks licensing and management thereof.

On the second phase, the research is focused on conceptual argument on variables of good governance, transparency and accountability to promote economic growth. This forms chapter two. It addresses how having an independent oversight body to check the process of awarding oil and gas blocks in a country limits avenues of corruption and avoids potential conflict between the community and the IOC and/or Government. It further looks at how opacity, unchecked

discretion and lack of public participation could result in economic loss, environmental degradation and revenue leakages.

In an analytic approach, the third chapter is focused on the domestic legal and legislative framework and policies on oil block management and transparency. It puts into perspective the existing laws, rules and policy frameworks and the enforcement mechanisms. Further, it looks at the international law on oil exploration and production of oil and gas as well as the available framework on transparency, i.e. the Extractive Industries Transparency Initiative (EITI).Consequently, it audits the Kenyan standard against the international standards and the global transparency standards.

To bring about a comparative feel of the topic, the fourth segment, chapter four, forms the comparative analysis of a case study. In this case, the focus was on the case study in the Famfa Oil – Folorunsho Alakija allocation of Block OML 127 of the Agbami field in Nigeria. The Chapter addresses the approach taken in the jurisdictions and its impact on mineral rights management. This is instrumental in coming up with a critical perspective and best comparison framework. In this regard, the chapter seeks to explore how Kenya can decipher the success and best practice or otherwise learn from lack of it. The chapter will further look at the global best practices as espoused in the Republic of Ghana and the United Kingdom which are considered advanced in entrenching transparency and governance parameters in line with the global standards.

In summing up the findings of this research, the fifth and final chapter incorporates the conclusions and recommendations. This includes the output from all chapters and analytically conclude as to the legal position of the problem addressed. In this regard, it will give the possible remedial, legal or policy framework to be adopted to conform to the international requirements, conventions and best practices on oil block management which will form the basis for recommendations for the improvement of the Kenyan model.

1.11 DEFINITION OF TERMS

Economic Loss

The exploitation or the utilization of any natural resource has to be done prudently. There is an equilibrium that dictates the balance in any economy. The same is true for the oil and gas sector. As Xiaoyi Mu acknowledges, the oil and gas sector operates on its own matrices and translates to various results depending on the strategy employed.[61] When that equilibrium becomes elusive, the concept of economic loss chips in.[62]

Generally, a nation's resources are exploited for the benefit of its people. The government is the trustee and the custodian of a nation's resources. As observed by the House of Lords in the case of *Hedley Byrne vs. Heller & Partners ltd*[63]for a claim of economic loss to arise, there must be a fiduciary relationship. This is juxtaposed with the fact the exploitation of natural resources is quintessentially a fiduciary relationship between the governor and the governed.

Transparency

Transparency generally denotes openness. In its architectural and philosophical foundation, transparency is more of a principle of constitutionalism and human rights.[64]Feichtner, Isabel, et al, opine that transparency comes about in order to mitigate the likelihood or the effect of violation of human rights.[65] Transparency generally has several limbs that all together join to support the pillars of the concept and to enhance good governance in the extractive industry. An example of a subset of transparency is Contract Transparency (Publish What You Pay) which is an interactive map showing countries that have published their contracts with extractive companies, accompanied by links to the contracts.[66] It is however a generally accepted principle

[61]Xiaoyi Mu, *The Economics of Oil and Gas*, Agenda Publishing (Columbia University Press), December, 2019 (Forthcoming).
[62]Shell International and The Development Research Center (DRC) of the State Council of the People's Republic of China Editors (Rudy Swennen, Department of Earth and Environmental Sciences,
K.U. Leuven, Heverlee, Belgium), *China's Gas Development Strategies: Advances in Oil and Gas Exploration & Production*, Springer imprint, 2017.
[63]*Hedley Byrne vs. Heller & Partners ltd* (1964) AC 465 HL.
[64]Feichtner, Isabel, et al (Eds.), Human Rights in the Extractive Industries: Transparency, Participation, Resistance, Springer International Publishing, 2019.
[65]Ibid; Goldwyn, David L. "Extracting Transparency."*Georgetown Journal of International Affairs*, vol. 5, no. 1, 2004, pp. 5–16. JSTOR, www.jstor.org/stable/43133588.
[66]Ibid.

that transparency consists of opening up government information to the public for scrutiny by society.[67]It does not only imply an act of accountability to a specific person or the simple disclosure, but the democratic practice of revealing government information and creating participatory and public processes for engaged democracy.[68] Globally, transparency continues its development as a key pillar in hydrocarbon governance;[69] while the effects of lack of it or otherwise their inadequacies have been far reaching.[70]

[67]Peter D. Cameron and Michael C. Stanley Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries Published: *Washington, DC: World Bank*, June 2017 Pages: 219 – 238.

[68]Adedolapo A. Akinrele, Transparency in the Nigerian oil and gas industry, *The Journal of World Energy Law &Business*, Volume 7, Issue 3, June 2014, Pages 220–235.

[69]Gillies, Alexandra. "Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm."*International Studies Quarterly*, vol. 54, no. 1, 2010, pp. 103–126. *JSTOR*, www.jstor.org/stable/40664239.

[70]Shkabatur, Jennifer. "Transparency With(out) Accountability: Open Government in the Lindstedt, Catharina, and Daniel Naurin. "Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption (La Transparence Ne Suffit Pas: Rendre La TransparenceEfficaceDans La LutteContre La Corruption) (La Transparencia No Basta: CómoCrearUnaTransparenciaEfectiva Para Reducir La Corrupción)." International Political Science Review / Revue Internationale De Science Politique, vol. 31, no. 3, 2010, pp. 301–322. JSTOR, www.jstor.org/stable/25703868.United States." *Yale Law & Policy Review*, vol. 31, no. 1, 2012, pp. 79–140. JSTOR, www.jstor.org/stable/23735771;

CHAPTER TWO

2.0 Introduction

At the heart of governance and a civilised society, is the concept of accountability, checks and balances. Governance, stripped to its bare minimum denotes the exercise of legitimate power of the governed by the governor. At its inception, the human kind desirous of creating an organised society ceded power to the governor in the form of a social contract that governs their intercourse. Such power however, has always been prone to abuse by the governor and consequently, the governed have had to come up with mechanisms of ensuring that balance in the exercise of power is achieved. This chapter will contextualise the concept of governance and lay the ground basis as a yardstick for auditing transparency and accountability measures in the Kenyan framework.

2.1 Conceptual Argument

Having an independent oversight body to check the process of awarding oil and gas blocks in a country limits avenues of corruption and avoids potential conflict between the community and the IOC and/or Government.

Good governance and transparency in the extractive sector is the precursor to the realisation of economic and social growth.[71] The extractive industry has several key actors. Unique among them, however, is the Government. This is because the government has sovereignty over the land and all resources within its jurisdiction.[72] Such power places immense power and advantage on the state and cogent checks and balances must be put in place to oversee and mitigate the potential for abuse. This is especially critical for a resource dependent country. Mineral resources world over, have the potential of improving a country's Gross Domestic Product (GDP) and the livelihood of its citizens by providing employment and social amenities.[73] Across

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[71] Nicholas Wasonga Orago and Pauline Vata Musangi, "Titanium Mining Benefit-Sharing in Kwale County: A Comprehensive Analysis of the Law and Practice" in J Osogo Ambani (ed), "Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya" (2018) Strathmore University Press.

[72] T.W. Wälde, "In the Arbitration under Art. 26 Energy Charter Treaty (ECT), Nykomb v. The Republic of Latvia - Legal Opinion", (2005) 2/5 *Transnational Dispute Management*, 1 – 107.

[73] Soderholm P &Svahn N, 'Mining, regional development and benefit sharing in developed countries' 45 *Resources Policy Journal* (2015), 80

many jurisdictions, the benefit derived from hydrocarbon and natural resources is the constant variable. Some countries advance and manage to get the best from hydrocarbon and other natural resources, while others have not been able to derive the best of these resources.[74] This is the constant independent variable in all these jurisdictions. For a nation to achieve the best and effectively utilise the benefit derived from most of its non-renewable resources, it has to have sound management and transparency structures.[75] Where such arrangements do not exist or are weak, there is a tendency to gravitate towards anarchy, economic loss and into the dark alleys of the resource curse.

This apparent disjoint between the two scenarios have informed the debate as to why some resource-rich countries have underperformed compared with resource-rich countries.[76] This mirror effect draws a picture of a constant variable being the levels of development derived from the resources of a country. Some countries have been able to master the dynamics and the ingredients necessary for translation of economic resources into progress and economic growth.[77] On the other hand, some resource-rich countries have experienced exponential challenges with resource leakage[78], constant economic loss and in some instances political instability.[79] From the theoretical framework herein, all sovereign mineral wealth is deemed assets of the people and are managed and controlled by the state as a mere trustee.

In a trustee relationship, transparency in the management of trust property is key and immutable.[80] The absence of transparency is a precursor to mismanagement and conflict. In mineral wealth, therefore, the benefit derived from the mineral wealth varies from country to country. However, there are some commonly and universally agreed factors that are instrumental

[74]Andrew Bauer, Natural Resource Revenue Sharing, *Natural Resource Governance Institute*, September, 2016, 5 – 102.

[75]Sefton Darby, Resource Governance: New frontiers in transparency and accountability, *Transparency & Accountability Initiative,* 2010, Cambridge, London, 5 – 63.

[76] Jeffrey D. *Sachs*, Andrew M. *Warner*, "Natural Resource Abundance and Economic Growth" NBER Working Paper No. 5398. Issued in December *1995*

[77]Charishma Idamakanti, Kislay Bhardwaj, Catering the Telecom Conundrum of Revenue Leakage: Blockchain- A Business Paradigm (2017) *International Journal of Engineering Technology Science and Research*, 319.

[78]N. Elekwa & EmeOkechukwu, Internal Revenue Leakages Prevention and Control in the Local Government System (2014) 14/4 *Global Journal of Management and Business Research: Administration and Management,* 51.

[79]Gyampo, Ransford Edward Van, Transparency and Accountability in the Management of Oil Revenues in Ghana, (2016) *Africa Spectrum*, 51, 2, 79–91.

[80]Lindsay Stirton, 'Transparency Mechanisms: Building Publicness into Public Services' Vol. 28 No. 24, *Journal of Law and Society* (2001) pp.471 – 489.

in dictating the variable result. Such a factor is transparency.[81] Since the state is managing the trust property and the people have not ceded all their power,[82] the levels of transparency play a key role in maintaining the correct balance of resources and their utilisation. The other key factor the goes hand in hand with transparency is information disclosure and availability. In all human endeavours, information is a key element in decision making. The two principles of transparency and information availability, access and disclosure are the key pillars of good governance in the hydrocarbon realm.[83]

The relationship between information access, transparency and accountability cannot be gainsaid. On 30 October 2001,[84] the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was enacted to further democratise and liberalise access to information in environmental matters under the umbrella of the United Nations[85]. The convention focuses on transparency through information access and disclosure in order to keep governments and governmental agencies accountable and in turn instrumental in combating poverty, environmental degradation and systemic failures occasioned by opacity.[86] Accountability in management of the extractive industry rights denotes the accessibility of data relating to the extractive excursions and the prudent management of the utilisation of resources in a transparent manner.[87]Article 5 (2) of the Convention underscored the nexus between transparency and information access. It provides that national legislation sanctions public authorities to provide environmental information which is transparent and is easily accessible. Further, on matters pertaining to the environment, the convention under Article 7 provides that programmes should be done within a fair and transparent framework. This is

[81]Lindsay Stirton, 'Transparency Mechanisms: Building Publicness into Public Services'
[82]*Njoya & 6 Others v Attorney-General and 3 Others*, Misc. Civil Application No. 82 of 2004.
[83]Jennifer Shkabatur, 'Transparency With(out) Accountability: Open Government in the United States', Vol 31 No. 1, *Yale Law and Policy Review*, (2012) pp. 79 – 140.
[84]Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25th June, 1998 – entered into force on 39th October, 2001 in accordance to article 20(1).
[85]United Nations Economic Commission for Europe, *The Aarhus Convention An Implementation Guide;Securing the public's rights through access to information, public participation and access to justice for a healthy environment,* United Nations, 2nd Ed. 2014.
[86]United Nations Economic Commission for Europe, *The Aarhus Convention An Implementation Guide; Securing the public's rights through access to information, public participation and access to justice for a healthy environment,* United Nations, 2nd Ed. 2014.
[87]Global Witness, *Blue Print for Prosperity: How South Sudan New Laws Hold the Key to a Transparent and Accountable Oil Sector*, November, 2012, 13.

essential in keeping in line with the aim of the convention which is to further accountability and transparency in decision-making and to strengthen public support for decisions on environmental matters. The applicability of this Convention is significant in decision making on matters affecting the environment in licensing of oil blocks and management of hydrocarbon rights.

A country's choice or design of what model should be used to base its process of licensing of oil blocks is hinged on many factors. These factors include geological potential, market and economic potential. The end goal, however, should be a model that is able to pick the correct fit partner for the project, get the best terms for the state, limit/eliminate corruption and reflect broader sectoral goals.[88]

Not all factors affecting the design of efficient allocation systems can be controlled or influenced by governments. They can however adapt their allocation strategies to respond to changes in the market and economic conditions.[89]

There is no model allocation policy or system appropriate for all governments and all circumstances.[90] The optimal design depends on a range of factors and requires the definition of the objectives that policymakers aim to achieve through the allocation of petroleum E&P rights.[91] Some of these objectives may be more effectively achieved by combining allocation systems with other policy tools, in particular, the fiscal system and market regulation. Country-specific objectives and constraints tend to change over time, as do exogenous factors.[92] In addition, countries tend to license E&P rights in areas that have disparate characteristics.[93] For

[88]NRGI Reader, "Granting Rights to Natural Resources: Determining who Takes Natural Resources out of the Ground" NRGI March 2015 <https://resourcegovernance.org/sites/default/files/nrgi_Granting-Rights.pdf> accessed 27th April 2018.

[89]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg xii

[90]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg xii

[91]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg xii

[92]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg xii

[93]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg xii

these reasons, countries often adopt a range of allocation policies, including open-door systems and various forms of licensing rounds.[94]

It is on this premise, that Kenya's licensing of oil rights design needs to be pegged on comprehensive and unequivocal legislation and regulations that take into consideration the fact that optimisation of the design will be achieved when the design's goal is to increase economic rent.

In conclusion, therefore, it is common knowledge that good governance of natural resources translates to higher returns to the people to whom the funds belong. Governance parameters and ideologies however, differ across the world. Different jurisdictions have employed varying models with mixed results. One such governance parameter that cuts across is the concept of good governance, transparency and information access, disclosure and availability. A transparent system translates to a better governance index and revenue for the people. The absence of transparency translates to opacity and a breeding zone for corruption, failure and resource curse.

[94]Silvana Tordo et al Silvan Tordo, David Johnstone and Daniel Johnston, "Countries' experience With the Allocation of Petroleum Exploration and Production Rights: Strategies and Design Issues." 2009 World Bank Working Paper-Draft.pg xii

CHAPTER THREE

Legal and Legislative Framework in Oil Block Licensing and Management in Kenya

3.0 Introduction

This Chapter will deal with the domestic legal, legislative and regulatory framework and policies on oil block management and transparency. It will put into perspective the existing laws, rules and policy frameworks and the enforcement mechanisms ranging from the initial processes of oil block gazettement, licensing and production and the underlying concept of transparency in the management of these hydrocarbon rights. Analysis of the ensuing acts of parliament will also be dealt with. Further, it will look at the international law on oil exploration and production of oil and gas as well as the available framework on transparency, i.e. the Extractive Industries Transparency Initiative (EITI). This chapter therefore seeks to answer the question as to whether the discretionary powers granted to the Cabinet Secretary are inimical to transparency and accountability.

Most oil contracts and exploration licenses were consummated under the former statutory regime. Ngamia 1 being the primary point of reference espoused some weaknesses and latent defects in the licensing system that the current Act seeks to resolve. There have been several farm-ins and farm-outs in Ngamia 1 with no transparent regulations. This, therefore, offers a keen focus on the milestones embodied or lack of it in the new dispensation and how far it entrenches transparency in the management of hydrocarbon rights. This chapter will, therefore, focus on the existing regime in the reflection of the former system and how best the lessons from Ngamia 1 have been chiselled to the law that was passed.

3.1 Legal and Regulatory Framework

3.1.1 *The Constitution of Kenya*, 2010

Kenya in 2010 adopted a transformative charter ushering in a new constitutional dispensation.[95] At the heart of this transformative charter is the sovereignty of the people and the rule of law. It

[95]*Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR, Paragraph 51; *Samuel KimuchuGichuru& another v Attorney General & 3 others* [2015] eKLR, Paragraph 56; *Pharmaceutical Society of Kenya v National Assembly & 3 others* [2017] eKLR, Paragraph 93; *Republic v Independent Electoral and*

further ushered in a new era in the management of natural resources and hydrocarbon rights. Under the Constitution, all mineral and natural resources belong to the people of Kenya and are managed by the state on their behalf.[96] The state is a mere custodian of the mineral resources and manages them under the charter being the Constitution. Being a transformative Charter, Article 10 thereof provides that all state organs, state officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include the participation of the people, inclusiveness, integrity, transparency and accountability.[97] This contemporary textual approach militates every approach to the interpretation of this supreme law and other laws of the land. This, therefore, forms the basis for discussion in this chapter.

At the core of management in hydrocarbon rights is the requirement for ratification by parliament of some contracts relating to natural resources. Article 71 defines the scope of what is subject to ratification by parliament. This provision had however not been operationalised in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*[98]where the High Court held that even though Article 71 requires parliamentary approval of transactions, the same has not been operative as statute has not been enacted and therefore cannot be visited upon the contracting parties. With the enactment of the *Mining Act*, 2016, this has now been factored in Section 117 (5) of the Act.[99] Concerning hydrocarbon rights, this has now been made mandatory under section 58 of the *Petroleum Act*.[100]

On the ownership of hydrocarbon rights, the Constitution vests all natural resources to the people of Kenya. Natural resources, constitutes public land under the definition of Article 260 of the Constitution. In *Water Resources Management Authority v Krystalline Salt Limited*[101], the court addressed the idea of natural resources and how they vest in the people, and the fact that the state

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Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, Paragraph 57

[96]Tom Ojienda, 'Land Law and Conveyancing: Principles and Practice', *LawAfrica*, 2015 pg. 1 -33.

[97]*Pharmaceutical Society of Kenya v National Assembly & 3 others* [2017] eKLR, Paragraph 93.

[98]*Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17* others [2015] eKLR.

[99]*Mining Act*, No. 12 of 2016, Section 115 (5).

[100]*Petroleum Act*, 2019, Section 58.

[101]*Water Resources Management Authority v Krystalline Salt Limited* [2018] eKLR; *Ledidi Ole Tauta& Others v Attorney General & 2 others* [2015] eKLR; *Water Resources Management Authority v Kensalt Limited* [2014] eKLR, Paragraphs 21, 36, 41, 47 and 59 and *Lake Naivasha Friends of the Environment v Attorney General & 2 Others* [2012]eKLR.

is a mere trustee. It therefore organically flows that such resources must be employed in a sustainable manner and in accordance with the will and aspirations of the Kenyan people.

3.1.2 *Petroleum Act,* 2019

By giving unchecked discretion to the cabinet secretary in charge of petroleum on licensing of oil and gas blocks, the Petroleum Act under section 10, 18 & 126 creates opacity which could lead to avenues for corruption and conflict between the community and the IOC and/or the Government

The enactment of the *Petroleum (Exploration, Development and Production) Bill*, 2017 into law in 2019 opens new frontiers in the management of hydrocarbon rights and seeks to align the regime with the Constitution of Kenya, 2010. As noted earlier, it further operationalises some muted provisions of the Constitution such as Article 71 which requires parliamentary ratification for mineral resource agreements.[102] The striking effect on management of mineral and hydrocarbon rights is the entrenched safety valves, checks and balances that ensure the transparent and sustainable management of natural resources by the *Constitution of Kenya,* 2010.

The enactment of the *Petroleum Act,* 2019 effectively repeals the *Petroleum (Exploration and Development) Act.*[103] This change in the operative statute calls to fore an appraisal of the new safeguards and achievements embodied or portended by the new legislation. This Act has a much wider scope as it applies to upstream, midstream and downstream activities. This new enactment has integrated several transparency measures and global best practice in the management of hydro carbon rights. The first salient feature is the establishment of National Petroleum Advisory Committee on an advisory role[104]. The Committee advises the Cabinet Secretary on petroleum contracts and recommends the revocation or cancellation of petroleum licences.

On information flow, the Act empowers the Cabinet Secretary to develop regulations for operation and management.[105] The Authority (EPRA) is tasked under the Act to collect and

[102]*Constitution of Kenya,* 2010, Sixth Schedule, Clause 8 (3) provides that the provisions of Article 71 of the Constitution shall not take effect till the operative legislation is enacted.
[103]*Petroleum Act,* 2019, Section 128.
[104]Established under Section 12
[105]Sections 18, 126, *Petroleum Act,* 2019.

maintain data of oil exploration firms in Kenya.[106] EPRA being the body mandated to grant a non-exclusive exploration licence, the task therefore comes in handy as it is well placed to monitor compliance. The Cabinet Secretary under section 126 is tasked with making of rules that govern data collection and dissemination.

In what appears to be a restatement of constitutional provisions, the Act restates that petroleum rights belong to the people and further in abundance of caution states that explorative firms have no proprietary rights.[107] This buttresses on the earlier finding that according to the Constitution all mineral resources belong to the people and the state manages them as a mere trustee.

The Act in a classical approach to transparent reporting structure requires the Cabinet Secretary to publish a reporting framework. This seems geared towards making information accessible and easy to find and utilise considering that the same will be to centralised at the National Data Centre.

From the announcement of the discovery of oil in Block 10BB in 2012 by Tullow Oil to the enactment of the Act in 2019, information and analysis of potential pitfalls have been gathered all along.[108] An example is in the case of *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others*[109]which pitted vital players in the extractive industry. At paragraph 4 of the Judgement, the court held that:

> "The basis on which Interstate sought those reliefs was that in the course of carrying out its drilling programmes in Turkana and West Pokot areas of the Rift Valley to prospect for water for the local communities, it (at the time it was known as Interstate Mining Co. Ltd) had encountered "a black substance smelling like kerosene" which it suspected "to be crude oil"; that it then provided the Permanent Secretary with samples of that substance in December 2005 with a request to carry out chemical analysis; that thereafter, it applied to the Permanent Secretary to be issued with a non exclusive exploration permit with a view to obtaining further crude samples for further chemical analysis and with a view also to undertaking crude reserve quantification feasibility report as a foundation for a production sharing contract with the Ministry of Energy and its overseas strategic

[106]Section 22 (5), *Petroleum Act*, 2019.
[107]Section 14, *Petroleum Act*, 2019.
[108]Kennedy Mkutu and Gerard Wandera, **'**Conflict, Security and the Extractive Industries in Turkana, Kenya: Emerging Issues 2012 – 2016', *United States International University & Kenya School of Government*, 2016.
[109]*Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others* [2016] eKLR.

> investors; that the Minister of Energy robbed it of its "God given find" in that, using Interstate's samples, the Minister "deceitfully and fraudulently" expropriated and misappropriated its secrets and "clandestinely" issued exploration permit in respect of Blocks 10BA, 10BB, 11A, 11B, 12A and 13T to the interested parties."

At paragraph 5 it was further noted that:

> "Interstate further contended that despite having procured the requisite permits and authority from the County Council of Turkana and that of Pokot and having procured "serious and competent strategic investors with requisite financial and technical capabilities", the Minister ignored or refused to respond to its letters and applications for exploration permit(s) in respect of Blocks 10BA, 10BB, 11A, 11B, 12A and 13T. According to Interstate, the Minister "fraudulently sold out the secrets and transferred the benefits" accruing to it to the interested parties."

This excerpt, in as far as it is merely a party's version of the dispute before court, is instrumental in tracking the steps and the birth of vibrancy in the extractive industry in Kenya. They serve as a horrible reminder of the rigours that parties can undergo when there are no clear set mechanisms/rules for the determination of rights and orderly grant of exploration and prospecting licenses.

With the endless search for oil within the gazetted blocks, conflicts continually arise. In *Daniel Ngotiek Nchui& 3 others v National Oil Corporation of Kenya & anothe*r[110] relating to the exploration of Block 14T in Magadi Area where the petitioner went to the Environment and Land Court at Kajiado decrying that the National Oil Corporation had trespassed their land while prospecting for oil. The underlying lesson from the analysis and determination of the court is the information asymmetry between the exploration firms and the native population who seem not aware of the intricacies and the need to participate in environmental impact fora before licences are granted.

Under the *Petroleum Act*, 2019, the award of petroleum rights will now be by competitive bidding before the licences can be granted.[111] Under the Act, the Cabinet Secretary advertises the intention to award petroleum blocks, and the interested parties place their bids in what is known as a Licensing Round.[112] The Cabinet Secretary however still maintains substantial powers in

[110] *Daniel NgotiekNchui& 3 others v National Oil Corporation of Kenya & anothe*r [2019] eKLR
[111] Section 18 (4) (b), *Petroleum Act*, 2019.
[112] Section 18 (2), *Petroleum Act*, 2019.

determining the responsiveness of bids.[113] The Cabinet Secretary can again enter into direct negotiation with exploration firms and award licences; the EPRA, however, retains the right to award a non – exclusive exploration permit.[114] Generally, the Act has no clear procedure for conducting transparent bids and safeguards of ensuring the rights of bidders are protected. The absence of such a procedure leaves much to speculation hence falling short of international best practice in the management of hydrocarbon rights. The information data centre is a noble idea but there is no procedure to be followed in obtaining such information held thus leaving much to be governed by the *Access to Information Act,* 2016. The legislature therefore failed to appreciate the uniqueness and the novelty of information on oil and gas and the previous history of secrecy and inaccessibility of such information and therefore the need to further safeguard the right to information access.

The Act further covers the concepts of surrender on oil blocks and, the attendant rights and obligations that ensue under that surrender. The surrender is also intricately intertwined with decommissioning as players seeking to surrender a specific oil block must provide the Cabinet Secretary with a decommissioning plan. The liabilities for acts done by the player during the pendency of the licence are also taken into account.

3.1.3 *Energy Act,* 2019

As espoused above, this Act now regulates midstream and downstream petroleum.[115] It effectively repeals the *Energy Act*, 2006. The Act establishes the Energy and Petroleum Tribunal under Section 25 which has original civil jurisdiction over matters arising from bidding rounds carried under the Upstream Petroleum Law. This means that as soon as the bidding rounds open, any party aggrieved by the process will be subjected to appeal to the tribunal.

The Act further establishes under Section 9, the Energy and Petroleum Regulatory Authority which is a body corporate with the mandate and functions outlined under section 10 which are to regulate, monitor and supervise upstream petroleum operations in accordance with the *Petroleum Act,* 2019; provide information and statistics to the Cabinet Secretary in relation to petroleum;

[113]Section 18 (3), *Petroleum Act*, 2019.
[114]Section 18 (3), 22, *Petroleum Act*, 2019.
[115]See preamble

collect, manage and maintain upstream petroleum data and among others receive, review and grant applications for non - exclusive exploration permits.

However, this Act suffers the same fate as it fails to provide the parameters that guide dispute resolution thus leaving the tribunal with much discretion. The absence of a bidding procedure coupled with the discretion the tribunal enjoys hampers the development of the critical jurisprudence on bidding. This is especially the case where information is not available thus leaving the Tribunal as a sanitiser of ministerial fiat therefore falling short of transparency and global standards that advocate for development of administrative parameters.

3.1.4 *Environmental Management Coordination Act*, 1998

One of the globally recognised best standards in the management of hydrocarbon rights is the protection of the environment. Key jurisdictions that proffer global benchmarks incorporate environmentally conscious safeguards in the process of licensing and grant of petroleum exploration rights to extractive firms. Quintessentially, the *Environmental Management Coordination Act*, 1998 is the law applicable concerning safeguarding environmental concerns.

The *Petroleum Act,* 2019 under section 59 provides for the application and grant of a production licence. As a prerequisite for the grant of the licence, the extractive firm must submit an Environmental Impact Assessment report.[116]After an explorative excursion, decommissioning ensues as under Section 69 of the *Petroleum Act*, 2019 which provides that environmental concerns must be handled during decommissioning and further take into account the environment and natural resources in that particular area.[117] Part VIII of the *Petroleum Act,* 2019 also provides for environmental and health safety which must be carried on by the contractor in tandem with the provisions of the *Environmental Management Coordination Act*, 1998. The model production agreement under the Petroleum Act, 2019 further provides that upon being licensed, the contractor shall adhere to the provisions of the *Environmental Management Coordination Act*, 1998.

It is important to note that the Act herein was enacted as the first environmental statute in Kenya. As a result, much has developed and amendments to cure the inadequacies have been witnessed.

[116]Section 59 (c) (g), *Petroleum Act,* 2019.
[117]Section 70 (1) (c), *Petroleum Act,* 2019.

An obvious flaw however is the conflict resolution in matters relating to oil explorative forms and the impact on the environment and the host population. This needs to be harmonised so as to avoid jurisdiction clash between the Tribunals established under the Energy and Environment Acts.

3.1.5 *Government Contracts Act,* 1952

This Act provides for the making of contracts on behalf of the Government and trivial matters.[118]It aimed to provide for authority and manner of binding the government. The Act was enacted during the colonial era and has not been reviewed to ensure that it is in tandem with the rest of the laws.[119] This has in turn been noted and an amendment initiated through the *Government Contracts Bill*, 2018 which embodies the constitutional principles of transparency, accountability, public participation and the values and principles under article 10 of the Constitution. The bill further expands the scope by incorporating anti-corruption and anti-bribery laws as well as making provisions for contract security to cushion the taxpayer in instances where the contract is not performed as well as binding County Governments.

3.1.6 *Access to Information Act,* 2016

As earlier stated in this thesis, information is the manure of a flourishing democracy. The preamble provision of the Act renders itself to easy deciphering over its intent and purpose. The Act is primarily a brainchild of Article 35 of the Constitution aimed at operationalising the Act and conferring on the Commission on Administrative Justice the oversight and enforcement functions and powers of the right of access to information. In *Peter Makau Musyoka& 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others (Mui Case)* the court held that access to information is a crucial component in transparency and management of collective rights.[120] Courts have in various other fora held that public participation is of no use/consequence unless information necessary for such meaningful participation is available.[121]

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[118]*Government Contracts Act,* Cap 25.
[119]Office of the Attorney General and Department of Justice, *The Government Contracts Act*, <https://www.statelaw.go.ke/1097-2/> on 6th April, 2019.
[120]*Peter Makau Musyoka& 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] eKLR*
[121]*Nairobi Law Monthly Company v Kenya Electricity Generation Company & 2 Others* [2013] eKLR.

In the oil extractive sector, the award of the famous Ngamia I (Block 10BB) before the discovery of oil was not known. The communities severally decried of the secrecy of the project and lack of information.[122] Buttressing the philosophical foundation that natural resources are trust property, it has also been postulated that information, especially on collective natural resources and such information, is held in trust by the state and the people who are the owners of the information have a right to access the information held in their trust.[123] Further, as alluded to earlier in this paper, Cordaid baseline report postulated that the difficulty in accessing information intelligible to the locals of the affected community propagated the mystery in management of hydrocarbon rights.[124] This information asymmetry breeds corruption and clouds the process. Since the affected community cannot access information affecting them, the actors in the industry take advantage of this and in turn disenfranchise the locals of their rights including compensation for the use of their land or in instances where they are affected by the activities of extractive firms. A case closer to the scenario herein is a case in Kitui County where the information asymmetry between the locals and the actors in the industry led to cases of corruption and extortion in areas where the Kenya Electricity Transmission Company Limited (KETRACO) was seeking to compensate natives for the grant of a wayleave corridor.[125]

The *Access to Information Act*, which is the operative law giving effect to the provisions of Article 35 of the Constitution, envisages the office of the Ombudsman as the custodian of the right. However as the African Network of Constitutional Lawyers (ANCL) postulate, it is not merely enough for information to be freely available but it is crucial that the information is

[122]Shitemi Khamadi, Environmental Impact of Tullow Oil Drilling a Mystery (February 10, 2014) at <http://www.shitemi.com/extractive-industry/environmental-impact-of-tullow-oil-drilling-a-mystery/> on 6th April, 2019.

[123]Peter Gathu and Henry Kahindi, Access to Information in Kenya, *Adili – Transparency International Kenya* (October/November, 2015) Issue No. 155: Access to information is fundamental in a society that is governed by the rule of law. For the reason that governments hold information in trust in behalf of citizens, it follows that citizens have the right of access to the information held by the State. Access to timely and accurate information provides individuals with the knowledge required to participate effectively in the democratic processes in any democratic society. Access to information fosters openness and transparency in decision-making.

[124]Cordaid Kenya, Oil Exploration in Kenya: Success Requires Consultation - Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya (Report) August, 2015, 22.

[125]Reported to the Ethics and Anti – Corruption Commission as EACC/MCKS/OPS/INQ/01/2018 and the result published in the Kenya Gazette No. Vol. CXXI – No. 39, Gazette No. 3129 pursuant to the provisions of Section 35 of the *Anti-Corruption and Economic Crimes Act, 2003* as read with Section 11 (1) (d) *of the Ethics and Anti-Corruption Commission Act, 2011*.

verified, accurate and above all not distorted or skewed as to mislead or misinform. [126]From a historical perspective, the right to information as a constitutionally guaranteed right has developed exponentially. The Repealed Constitution guaranteed the right under section 79 but at the same time clawed back the right by limiting it on the grounds of public health and national security or safety.[127] Under the Constitution of Kenya, 2010, there is a centralised limitation clause under Article 24 which embodies a much-relaxed restriction.[128]

Official Secrets Act[129]prohibits any person from obtaining and transmitting any information that in the opinion of the State, is calculated to be or might be or is intended to be directly or indirectly useful for a foreign power or disaffected person.[130] This prohibition and limitation has however proven to be shaky and its justification withered by the advent of the Constitution of Kenya, 2010 as was demonstrated in the case of *Boniface Mwangi v Inspector General of Police &5 others*[131] which espoused stringent safeguards and the respect for the rule of law. It demonstrated a departure from the previous anecdotes that "national security" was whipped out to tramp on any right.

In a pragmatic approach, the interpretation of Article 35 on the right to information has been classified into two as was demonstrated in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others*[132] where the court held that the right to information constitutes both an 'active' and a 'passive' concept. A "passive" aspect includes the right of the public to seek from public authorities, and the obligation of public authorities to provide information in response to a request while an "active" aspect includes the right of the public to receive information and the obligation of authorities to collect and disseminate knowledge of public interest without the need for a specific request.

The approach espoused herein is that even though there was partial compliance in the disclosure of the report, the fact that there was no prior participation by the key or interested players negates

[126] African Network of Constitutional Lawyers (ANCL), Towards Promoting Access to Information in Kenya, *University of Cape Town*, April, 2011, 4.
[127]Section 79(2) of the former Constitution of Kenya.
[128]M. Kiwinda Mbondenyi and J. Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, (1st Ed, 2012) p. 175.
[129]*Official Secrets Act, Cap, 187.*
[130]Section 3 (1), *Official Secrets Act, Cap, 187.*
[131]*Boniface Mwangi v Inspector General of Police & 5 others* [2017] eKLR.
[132]*Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] eKLR

the partial agreement. Bringing this approach to the Ngamia 1 case study and the award of Block 10BB to Tullow Oil posits the question of whether the same would have met the threshold set in the *LAPSSET Project Case*. This contrast serves as a reminder to government agencies that the right to information is a broadened aspect under the Constitution of Kenya, 2010. The establishment of the National Data Centre where petroleum data is to be centrally stored and analysed as per the dictated of the *Petroleum Act*, 2019 is a positive gesture towards realising the right and its adherence thereof.

3.2 International Legal Framework

3.2.1 Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI) is a non-binding concept considered as a global best practice that calls for extractive industries to report their payments to the governments of the countries where they operate. At the same time, governments have to disclose their receipts. The information is then reconciled and made public. The EITI is voluntary, but once a signatory, its requirements are binding. In 2003, the Civil Society Organisations in conjunction with International Extractive Corporations and investors both in developed and developing nations formed the Extractive Industries Transparency Initiative majorly to tackle the 'resource curse' problem.[133] This initiative requires all extractive companies operating within a nation's territory to disclose resource related payments made to the government. The government is, in turn, required to publish what it receives. These figures are then reconciled by an independent body drawing its membership from all sectors of the governance structure of a country's extractive industry. This form the crux of contract transparency and governance from the licensing of oil blocks to production contracts.

Nations keen on improving accountability and ensuring that the mineral resources are managed in line with the best global practices are encouraged to ascribe to the initiative. For example, Ghana is a budding player and an oil resource-rich nation with the discovery of Jubilee fields and have joined the ranks of countries that have ascribed to this initiative.[134] The *Petroleum Act*,

[133] *Patrícia Galvão Ferreira*, Extractive Industries Transparency Initiative (EITI): Using a Global Public---Private Partnership to Facilitate Domestic Governance

[134] See: The global standard for the good governance of oil, gas and mineral resources: Extractive Industries Transparency Initiative (EITI) available at <https://eiti.org/who-we-are> accessed on 20th December, 2018.

2019 defines the industry's best practices under section 2, and its application under the Act is cross-cutting from the decision of the Cabinet Secretary to compliance with environmental and safety standards. This incorporation of the best practices into the primary law governing upstream petroleum is, therefore, a positive step in steering the transparency initiative.

3.2.2 International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990

The Constitution of Kenya, 2010 provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.[135]Kenya has ratified the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990. This is an international maritime convention establishing measures for dealing with marine oil pollution incidents nationally and in co-operation with other countries. The convention addresses the human environment in general and marine environment in particular. This is instrumental in addressing offshore oil rigs and exploration and protection of the marine environment which is res nullius [136] and preserving the common heritage of humanity.

3.2.3 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25th June 1998

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters has not only been instrumental in environmental realms but has sparked off discussions in management of hydrocarbon rights.

As espoused by Article I of the *Aarhus Convention*, Public Participation has not been expressly defined by the convention, however, there are parameters and key pointers on what public participation entails. Article 6 (3) of the Convention provides that participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during environmental decision-making. The Convention under Article 6 (4) advocates for early participation.

[135]Article 2 (6) of the *Constitution of Kenya,* 2010.
[136]*Kenya Ports Authority v. East African Power and Lighting Company Limited* (Civil Appeal No. 41 of 1982): *Water Resources Management Authority v Krystalline Salt Limited* [2018] eKLR.

The procedure for public participation is provided for under Article (7) which provides that: 'Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.' It is worth noting the fact that the Convention places much premium on access to information which as alluded earlier is key in decision making and in making public participation a meaningful exercise.[137]

Although Kenya is not a signatory to this convention, the guidelines thereon on public participation and access to information have been embraced in a doctrinal way for instance in Mohamed Ali Baadi and others v Attorney General & 11 others[138]

3.3 Other Legal and Policy Framework

3.3.1 Vision 2030

The premium placed on the extractive industry in Vision 2030 is a testament of the immense potential it has towards the growth of a country's economy. The blueprint provides for the country's development trajectory from the year 2008 – 2030. It is based on three "pillars"; the economic pillar, the social pillar and the political pillar. One of the economic pillars is the energy sector which still contributes to the high cost of production. The Energy sector by extension includes upstream petroleum.

3.3.3 National Petroleum Policy

With the enactment of the Petroleum Act, 2019 there is now a requirement that the Cabinet Secretary comes up with a petroleum policy on the advice of the National Upstream Petroleum Advisory Committee. Once formulated, it will guide the petroleum industry and inform decision making. The policy should in light of the findings of this chapter embody transparency and accountability with proper checks and balances in line with the principles of governance and access to information. In effect the policy should be geared at benefiting Kenyans by realising the best of its hydrocarbon resources.

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[137] *Peter Makau Musyoka& 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] eKLR; *Friends of Lake Turkana Trust v Attorney General & 2 Others* [2014] eKLR.

[138] [2018] eKLR

CHAPTER FOUR

Comparative Analysis of Niger Delta-case of Famfa Oil Limited on Licensing and Management of Hydrocarbon Block and Salient Experiences in Ghana and the United Kingdom

4.0 Introduction

Nigeria has the largest natural gas reserve in Africa, and the second largest oil reserve in Africa.[139] By contrast, however, the wealth and oil resource has turned out to be a cause for disharmony and environmental concerns.[140] Nigeria, therefore, offers an ideal case study or comparison on the management of oil blocks. The case study chosen herein is a perfect blend of legal and systemic flaws that have cost the Nations of Nigeria loss of revenue it is entitled to lift from Famfa Oil Limited exploration of Oil Mining License OML 127. This is further bolstered by the fact that Nigeria has faced challenges with transparency as espoused in the case study of Famfa Oil and has proved a notorious case study on transparency in Africa. The oil industry dominates the Nigerian economy and accounts for more than 90 per centum of its exports, 25 per centum of its Gross Domestic Product (GDP) and 80 per centum of its total government revenues.[141] Thus, the Famfa Case offers an ideal case and a benchmark for testing legal and administrative flaws in Africa.

The case involving Famfa Oil Limited began with the award of OPL 216 under the then Nigerian Military ruler General Ibrahim Babangida.[142]The Agbami Field is one of the largest oil-rich deep-water reserves in Nigeria.[143] It also brought to fore the dynamics of conversion of an Oil

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[139]Adati Ayuba Kadafa, Oil Exploration and Spillage in the Niger Delta of Nigeria, *Civil and Environmental Research,*Vol 2, No.2, 2012.

[140]Joseph C. Ebegbulem, Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis, *International Journal of Business and Social Science Vol. 4 No. 3; March 2013.*

[141]Gunu Umar and Kilishi, A. Abdulhakeem, Oil Price Shocks and the Nigeria Economy: A Variance Autoregressive (VAR) Model, *International Journal of Business and Management* , Vol. 5, No. 8; August 2010.

[142]Odion Omonfoman, Folorunsho Alakija's Oil Block: Model of Nigerian Elite Racketeering?, Punch, March 14, 2018 at <https://punchng.com/folorunso-alakijas-oil-block-model-of-nigerian-elite-racketeering/> on 12th April, 2018.

[143]Odusote, F. (2013, August 5). Deepwater Nigeria Field Development: Challenges, Best Practices and Lessons Learned from the Agbami Field. Society of Petroleum Engineers.doi:10.2118/167534-MS.

Prospecting Licence (OPL) to an Oil Mining Licence (OML) and the rule of law.[144] The circumstances under which Alakija Folorunsho acquired OPL 216 is what has been termed as an elitist perspective where "Nigerian elite "hijacked" oil resource in the region in the name of "national cake" to the exclusion of the resource bearing communities."[145] That perspective notwithstanding, the case brought to fore the critical aspect in any oil-rich nation, management of oil blocks and hydrocarbon rights.

The case pitted Famfa Limited against the Federal Government of Nigeria through the Nigerian National Petroleum Corporation (NNPC) and was litigated virtually across the judicial hierarchy to its final determination in the Supreme Court of Nigeria. The country has always grappled with transparency which seems to have eluded it especially through its formative years under military dictatorship.[146] The Famfa Case, however, serves two key lessons. It is a reminder of the consequences of lack of transparency and the challenges associated with it. On the other hand, it is a testament of tenacity and the rule of law, that when legislature lays down rules that guide society,[147] the same must be followed, and the implementers must pay attention to what is laid down and cannot arbitrarily deprive a party of a right, even for a noble course by ignoring the laid down procedure for the safeguard of liberties and the rule of law.[148]

Generally, there was general discontent over the opacity and the circumstances in which a single person acquired the rights over one of Nigeria's most lucrative oil blocks.[149] This opacity, whether perceived or real, is what the government sought to claw back by compulsorily acquiring fifty per centum of Famfa Oil Limited. This offers an ideal case study on the management of hydrocarbon blocks and both the latent and the patent pitfalls that relate to it.

Thus, the chapter will seek to mirror the structural and legal pitfalls identified in chapter three against the successes or failures of other jurisdiction. With the benefit of hindsight, the chapter

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[144] *NNPC v. Famfa Oil Ltd* (2012) 17 NWLR (pt 1328) 148.

[145] Luke Amadi and Henry Alapiki, Perspectives and Dynamics of the Natural Resource Curse in Post 1990 Niger Delta, Nigeria, *Journal of Advances in Political Science,* Vol .1, No. 2., 45.

[146] Bukar Zanna Waziri, Multinational Oil Companies Operating in Nigeria: An Assessment of Sustainability Disclosure Performance, *International Journal of Research and Sustainable Development*; Volume 4, Number 4, 2012, *Pan African Book Company ISSN: 2276611*

[147] *Akintokun v. LPDC*(2014) 13 NWLR (pt. 1423) 1 at 91, paras. A – B.

[148] *NNPC v. Famfa Oil Ltd* (2012) 17 NWLR (pt 1328) 148.

149 Odion Omonfoman, Florunso Alakija's Oil Block: Model of Nigerian Elite Racketeering?, Punch, March 14, 2018 at <https://punchng.com/folorunso-alakijas-oil-block-model-of-nigerian-elite-racketeering/> on 12th April, 2018

will therefore seek to patch the misgivings identified with the success stories of other jurisdictions like Ghana. On the other hand, the failures of other civilisation like Nigeria will act as a reminder of the effect of governance flaws and act as beacons against such structural or governance flaws.

4.1 History of Famfa Oil Limited

Famfa Oil Limited was incorporated in 1991 by Alakija Folorunsho, a Nigerian fashion icon.[150] In May 1993, Alakija Folorunsho applied for an allocation for an Oil Prospecting License (OPL).[151] The OPL 216 was a leasehold license over the block.[152] She got the license/leasehold rights to explore for crude oil deposits on a 617,000-acre block (now called the Oil Prospecting License 216)[153] on the 10th of August, 1993 through her company Famfa Oil Limited.[154]

Famfa Oil Limited is considered an indigenous license holder as opposed to other players in the Nigerian case that are multinational or foreign.[155] Upon the grant of the license, the Company with a vision of being a leading indigenous oil and gas company embarked on oil exploration and soon struck oil in the block now known as Agbami fields.[156] To realise the fruits of its find,

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[150]Usman, Adamu Kyuka, 'Nigerian Oil and Gas Industry Laws: Policies, and Institutions', *Malthouse Press Limited*, 2017.

[151]Awoko Newspaper, Sierra Leone Business: From Fashion Designer to Oil Magnate: How billionaire Folorunsho Alakija replaced Oprah Winfrey as World's Richest Black Woman, Wed April 10, 2019 at<https://awoko.org/2017/04/10/sierra-leone-business-from-fashion-designer-to-oil-magnate-how-billionaire-folorunsho-alakija-replaced/> accessed on 12th April, 2019: In May 1993, Folorunsho applied for the allocation of an oil prospecting license (OPL). The license to explore for oil on a 617,000- acre block—now referred to as OPL 216—was granted to Alakija's company, Famfa Limited. The block is located approximately 220 miles south east of Lagos and 70 miles offshore of Nigeria in the Agbami Field of the central Niger Delta (Marie-Therese Phido *et al,* A Future Beyond Oil (Women in Oil and Gas) Boundless, Volume 5).

[152]Usman, Adamu Kyuka, 'Nigerian Oil and Gas Industry Laws: Policies, and Institutions', *Malthouse Press Limited*, 2017.

[153]The oil block itself is situated at about 220 miles to the southeast of Lagos and 70 miles offshore Nigeria in the Agbami Oil Field in the central part of the Niger Delta with the water depths taken to be between 1,280 and 1,650 metres (4,200 and 5,410 feet).

[154]Awoko Newspaper, Sierra Leone Business: From Fashion Designer to Oil Magnate: How billionaire Folorunsho Alakija replaced Oprah Winfrey as World's Richest Black Woman, Wed April 10, 2019 at<https://awoko.org/2017/04/10/sierra-leone-business-from-fashion-designer-to-oil-magnate-how-billionaire-folorunsho-alakija-replaced/> accessed on 12th April, 2019.

[155]Offiong I. Akpanika, Technology Transfer and the Challenges of Local Content Development in the Nigerian Oil Industry, *Global Journal of engineering research* VOL 11, NO. 2, 2012: 123-131; IlanBijaoui, Multinational Interest & Development in Africa; Establishing a People's Economy, *Palgrave Macmillan,* 2017; Odu, Peter**,** The Effect of Teleworking System on Employees' Performance in the Nigerian Oil and Gas Upstream Sector, *Peter, Apeejay-Journal of Management Sciences and Technology, 5 (3), June- 2018,* 24.

[156]Usman, AdamuKyuka, 'Nigerian Oil and Gas Industry Laws: Policies, and Institutions', *Malthouse Press Limited*, 2017.

Famfa Oil Limited had to convert its prospecting license OPL 216 to a mining license OML 127.[157] Upon the conversion, Famfa could proceed and mine oil in the field.[158] Upon being granted the leasehold rights to the block vide OPL 216 and having explored the fields, in 1996, Famfa Oil Limited signed a farm-in agreement with Star Deepwater Petroleum Limited which was a subsidiary of Chevron Texaco.[159] Star Deepwater Petroleum Limited was the technical advisor for the block. Later in 1998, Twenty (20) per centum of Star Deepwater Petroleum Limited interest in the block was assigned to Petroleo Brasileiro Nigeria Limited.[160] In March 2000, the Nigerian Government acquired an interest in the oil field sparking the legal battle under analysis herein.

4.2 Allocation of Oil Prospecting Licence (OPL - 216) to Famfa Oil Limited – Agbami Field

Generally, there are doubts as to the adequacy and content of the plethora of legislations with particular reference to the acquisition of oil rights for exploration, prospection and mining in Nigeria.'[161] As earlier mentioned, the licence to explore OPL 216 was originally granted to Famfa Oil Limited.[162] It is alleged that in the year 1993 under the military regime many oil exploration licences were awarded to people who then simply handed them over to multinational companies with the necessary technical expertise to prospect for oil.[163] Famfa Oil didn't have the necessary technical expertise to prospect and therefore as earlier stated, enlisted an advisor by

[157] Ayeni G. O, The Agbami Field, Blocks OPL 216 and 217, Niger Delta (200202549) University of Leeds

[158] Agbami Field is located between latitude 3^0 30'N and 3^0 50'N and longitude latitude $4^0$45'E and $4^0$58'E, 220miles south-east of Lagos and 70 miles offshore Nigeria, in the central Niger Delta.

[159] Petroleum Economist, Nigeria: Output lifted by Agbami start-up <https://www.petroleum-economist.com/articles/markets/trends/2008/nigeria-output-lifted-by-agbami-start-up> 16th April, 2019.

[160] The Fuqua School of Business, Duke University, 1 Tower view Drive, Durham, NC 27705, USA. http://faculty.fuqua.duke.edu/~charvey/Cases/index.htm

[161] Ogugua V.C. Ikpeze and Nnamdi G. Ikpeze, Examination of some Legislations Referencing Acquisition of Rights for Oil Exploration, Prospection and Mining in Nigeria, *Journal of Energy Technologies and Policy*, Vol.5, No.9, 2015.

[162] Austin C. Eneanya Pillars Behind Successful SMEs in Nigeria and the World, *Lulu Books*, 2019, Pg. 315. In May 1993 Alakija applied for an allocation of an Oil Prospecting License (OPL). The license to explore for oil on a 617,000 acre block – (now referred to as OPL 216) was granted to Alakija's company, Famfa Limited

163 Mark Amaza, Discretionary Awards of Oil Blocks in Nigeria: A State Capture Culture Passed Down from the Military Government (Heinrich-Böll-Stiftung, 2019) at https://za.boell.org/index.php/en/2019/08/21/discretionary-awards-oil-blocks-nigeria-state-capture-culture-passed-down-military on 5th June, 2020.

ceding forty (40) per centum of the Famfa Oil to Star Deep Water Petroleum Limited. In the year 2000, it was confirmed that the block had more than one billion barrels of oil.[164]

A licensee under an OPL has an exclusive right (a) to search for, (b) to drill, (c) to extract samples, (d) to export crude oil, and (e) to refine in Nigeria.[165] The grant under an OPL is limited as opposed to that under the OML which takes that nature of a lease and the accompanying exclusive rights. The grant of OPL 216 to Famfa oil was perceived as opaque because there was no requirement for an open tender bidding or a competitive process as it is the practice in many jurisdictions today. When OPL 216 was granted to Famfa Oil Limited it is doubtable whether the requirement as it is in place today pursuant to the Petroleum Act, 1969 and the Petroleum Regulations enacted thereunder were being implemented as it requires the person/company applying for an OPL to give demonstrable evidence of knowledge in oil prospecting and the requisite financial muscle to implement the licence granted. In that regard, the allocation of OPL 216 to Famfa Oil Limited and other allocations done in 1993 are seen as opaque and were done under unclear circumstances.[166]

Famfa Oil's woes began while it was still the holder of OPL 216 when the President and Commander-in-Chief of the Federal Republic of Nigeria directed that Government acquire 40% participating interest in OPL 216 allocated to Famfa Oil Limited, in accordance with the provisions of Paragraph 35 of the First Schedule to the Petroleum Act; and section 44(1) of the Constitution of the Federal Republic of Nigeria.[167]Famfa Oil battled the move to acquire its stake compulsorily and prevailed upon the courts. The Presiding Judge ruled in favour of the Famfa Oil.

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[164]N.*N.P.C. V. Famfa Oil Ltd&ANOR* (SC 178/2008)[2009] NGSC 7 (Supreme Court) court stated that Agbami Oil field has current crude oil production capacity of two hundred thousand (200,000) barrels per day which translates to daily gross earnings of about US$20 million at current crude oil price of US$124.00 per barrel.

[165]*Petroleum Act*, 1969 (Nigeria); United Nations Conference on Trade and Development UNCTAD/CALAG African Oil and Gas Services Sector Survey Volume 1 – Nigeria; Creating Local Linkages By Empowering Indigenous Entrepreneurs, Geneva and New York, 2006**.**

[166]The Procedure for Oil Prospecting License in Nigeria, <https://resolutionlawng.com/the-procedure-for-oil-prospecting-license-in-nigeria/> on 14th April, 2019.

[167]Famfa Oil Limited v. Hon. Attorney-General of the Federation &anor, (2007) 12 iLAW/CA/A/173/06.

4.3 Conversion of Oil Prospecting Licence (OPL – 216) to Oil Mining Licence (OML – 127)

In 2003, Famfa applied for a conversion from an OPL to an OML, and in 2004 the request was granted. OPL 216 became OML 127.[168] Famfa Oil, therefore, began extracting oil from OML 127 and currently has a concession licence expiring in 2024.[169] An OML is like a mineral lease (which does not involve an estate in the land) but which permits the lessee the use of the land to explore and dispose of any petroleum discovered within the leased area for a limited time.[170] The Nigerian government after renewing the lease in favour of Famfa Oil in 2004, again in 2005, through the Department of Petroleum Resources wrote to Famfa Oil informing it that it intended to acquire 5/6 of the Appellant's interest in OML 127. Not long after, the Department of Petroleum Resources again on 19th of April, 2005 wrote another letter to the Appellant, this time acquiring 50% of the Appellant's interest in OML 127.[171] This sparked a legal dispute over the government's acquisition of 50% of OML 127.

4.4 Acquisition of 50% stake of Famfa's Oil Mining Licence (OML – 127) by the Nigerian National Petroleum Corporation (NNPC)

The genesis of the dispute between the Nigerian National Petroleum Corporation and Famfa Oil Limited has its origin in the decision of the former to claw back fifty per centum (50%) of the sixty per centum (60%) shareholding held by Folorunsho Alakija which saw her take the corporation through the courts resting with the determination of the Supreme Court in her favour in 2012.[172] The final determination of the Supreme Court in 2012, in *NNPC v Famfa* revolved on an administrative law issue, that is; "whether the Nigerian Minister of Petroleum can disregard the provisions of a principal legislation (in this case an Act made by the Federal Legislature)

[168]Usman, Adamu Kyuka, 'Nigerian Oil and Gas Industry Laws: Policies, and Institutions', *Malthouse Press Limited*, 2017; Famfa oil limited v. Hon. Attorney-General of the Federation & Anor, (2007) 12 iLAW/CA/A/173/06. In March, 2003, the Appellant applied to the Minister of the Petroleum Resources for conversion of OPL 216 to Oil Mining Lease (OML). The application for the conversion was granted in 2004. The result of this was that OPL 216 was converted to become OML 127.

[169]Department of Petroleum Resources, 2014 Oil & Gas Industry Annual Report, Nigeria, 2014.

[170]*Petroleum Act*, 1969 (Nigeria); United Nations Conference on Trade and Development UNCTAD/CALAG African Oil and Gas Services Sector Survey Volume 1 – Nigeria; Creating Local Linkages By Empowering Indigenous Entrepreneurs, Geneva and New York, 2006**.**

[171]*Famfa oil limited v. Hon. Attorney-General of the Federation &Anor,* (2007) 12 ilaw/ca/a/173/06.

[172]*NNPC v. Famfa Oil Ltd* (2012) 17 NWLR (pt 1328) 148.

where the principal legislation conflicts with the provisions of a subsidiary/secondary relation made by the Minister under the powers conferred by the federal legislation?"[173]

The basis was laid at the appellate court when it observed that as per paragraph 35 of the Petroleum Act Cap 10 LFN 2004 negotiations into the government's participation should have taken place at the application level and not when the application has already been granted. Since the government had processed the application of conversion of OPL 216 to OML 127 by the Famfa Oil, government made no effort to call upon Famfa Oil to negotiate. It went ahead to approve the conversion. The government was therefore at fault and could therefore not purport to compulsorily acquire in circumstances where it had not negotiated with the licensee.[174]This scenario serves to demonstrate that even though there are laws to which the government may employ to ensure the maximum benefit from the depletion of its natural resources if they are not implemented properly, parties can circumvent them without being said to be on the wrong. The weak link herein was in implementation.

4.5Controversy over the "back –in the rule" (BIR)

The original intention of the "back – in – rule" has been termed as an attempt by the subsequent civilian government to "claw back" what the military regime had given out un-procedurally. The regulations that the government was relying on were contained in the *Deep Water Block Allocations to Companies (Back-in-Rights) Regulations* 2003. The Supreme Court in breaking down the issue in paragraph 11 stated that:

> *"The clear intention of the legislature is that negotiations should take place between the Minister of Petroleum and the applicant of the OML. The reasoning of the legislature is that the Minister while negotiating must take into account the huge sums of money spent by the applicant drilling for oil, and ensure that 50% stake of the Federal Government in the OML is well taken care of in terms acceptable to the Government. The question to be answered does the Minister for Petroleum negotiate with the applicant?"*[175]

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[173]Theophilus Olusegun Obayemi,, A Critique of the Sanctity of Oil Prospecting Licenses ("OPL") and Oil Mining Leases ("OML") in Nigeria: Within the Context of *Nigerian National Petroleum Corporation (NNPC) v. Famfa Oil Limited*, (2012) 17 N.W.L.R. Pt 148/(2012) C.L.R. 5(a)(SC) at https://www.proshareng.com/articles/Proshare%20Law/A-Critique-of-the-sanctity-of-OPL-&-OML-within-the-context-of-the-NNPC/2613 on 12th April, 2019.

[174]*Famfa oil limited v. Hon. Attorney-General of the Federation &Anor,* (2007) 12 ilaw/ca/a/173/06.

[175]See Hon Bode Rhodes-Vivour, JSC in *NNPC v. Famfa Oil*, (2012) C.L.R. 5(a)(SC) at p. 27.

The Supreme Court (Rhodes-Vivour) in delving into the administrative issue stated that the subsidiary regulation which was the basis for the "back-in-rights" owed its legitimacy to the parent statute. It also brought in considerable jurisprudential analysis on the rule of law in Nigeria.[176]Thus he stated:

> *The Back-in-Right Regulation 2003 is subsidiary legislation promulgated by the Minister under Section 9 (a) and (h) of the Petroleum Act. The Petroleum Act is substantive or Principal Law. It is the principal law that provides subsidiary legislation with the source of its existence. Without Principal Law, there can be no subsidiary legislation, and so subsidiary legislation must conform with the principal law. The Petroleum Act is principal law, a statute. Where it prescribes a particular method of exercising statutory power, the procedure so laid down must be followed without any deviation whatsoever. If any provision of the Regulations are inconsistent with the provisions of the Act/Statute the provisions of the Regulation shall to the extent of the inconsistency be declared void.*[177]

Back in rights however are not unique to Nigeria and have been experienced in other jurisdictions such as the Federal Republic of the United States of America in the states of Texas[178] and Oklahoma.[179] This, therefore, demonstrates that the 'back-in-rights" though noble to ensure that the state gets the maximum benefit from the resources, in the Famfa Oil scenario, the omission by the government proved a double-edged sword from the legal perspective acting as a testament of the Court's fidelity to the law and on the contrast, the costly implication of a governmental omission. Thus, without proper structures in place, the concept is prone to opacity and abuse.

4.6 Management of Oil Blocks and the Rule of Law in Nigeria

In a nutshell, in *NNPC v Famfa Oil Ltd* [180]the Supreme Court held that provisions of paragraph 2 of Deep Water Block Allocation to Companies (Back-in-Rights) Regulations 2003 (a subsidiary legislation under the Petroleum Act) which gives the Federal Government the arbitrary right to

[176]See F.G.N v. Zebra Energy Ltd. (2002) 18 NWLR (Pt. 798) p. 162; Ogulaji v. A.G. Rivers State (1997) 6 NWLR (Pt. 508) p. 209; UNTHMB v. Nnoli (1994) 5 NWLR (Pt. 363) p. 376.
[177]*NNPC v Famfa Oil*, (2012) C.L.R. 5(a)(SC) at p. 36.
[178]*Mengden v. Peninsula Prod Co.*, 544 S.W.2d 643-44 (Tex. 1976), the court held that a "back-in right" is also a reversionary interest in a lease which allows a party to a specified share of the working interest when the assignee has recovered specified costs from production.
[179]*McDonald v. HUMPHRIES*, 1990 OK 51 (Okla. 1990) held that the import of back in rights was to first allow the licensee to recoup the amount spent in the exploration.
[180](2012)17 NWLR (pt. 1328) 148.

acquire five-sixth of an OPL or OML interest is invalid to the extent that it is inconsistent with paragraph 35 of First Schedule to the Petroleum Act which stipulates that such participation or acquisition must be made on terms to be negotiated between the Federal Government and the holder of the OPL or OML.[181] As earlier espoused, this was a procedural flaw. The government renewed Famfa Oil's licence (OML Licence) without negotiating the terms of the acquisition. The attempt to later compulsorily acquire the licence on the face of the glaring omission raises several administrative issues and the concept of the rule of law.

The Nigerian Constitution under Section 44 provides that: "the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."[182] Being the supreme law governing all persons and all governmental action, it donated power to the legislature to enact laws to regulate the oil sector in Nigeria. As a result, the *Petroleum Act* was passed and under it the *Deep Water Block Allocations to Companies (Back-in-Rights) Regulations* 2003.

Today, Nigeria allots oil blocks by way of bidding rounds or direct negotiation with the Minister. This has been faulted due to lack of its transparency as it still reserves arbitrary powers for the minister. This model demonstrates that the Famfa Oil scenario that took place in 1993 widely viewed as irregular has not abated and continues being a constant threat to transparency. The case, however, serves as a reminder to government agencies on the need to put in safeguards to avoid the omission like the one witnessed in the Famfa case study.

4.7 Conclusion

The case study herein serves as a testament to two main concepts in management of hydrocarbon rights. The first is the need for transparency in the method and procedure of allocating and awarding hydrocarbon blocks. The Famfa case study shows that the allocation of the license to OPL 216 was mainly done clandestinely and not openly and transparently. A grave omission

[181]C. J. S. Azoro, National Participation in Nigerian Oil and Gas Industry: Prospects and Challenges, *Petroleum Technology Development Journal* (ISSN 1595-9104): An International Journal; January 2016 - Vol. 6 No. 1, 91.
[182]Section 44 (3) *Constitution of the Federal Republic of Nigeria*, 1999.

thwarted the subsequent attempt by the government to acquire rights in Famfa in the negotiation for the "back in rights". That omission serves as a horrible reminder to government agencies on the need for vigilance and watertight safeguard in management of hydrocarbon rights. The likelihood of opacity identified by the concentration of powers on the Cabinet Secretary in charge of petroleum, mirrored against this case study shows the potential for abuse.

4.8 Other Notable Global Best Practice Benchmarks and Comparative Analysis of Key Jurisdictions on Transparency in Licensing Hydrocarbon Blocks – Ghana and the United Kingdom

4.8.2 Introduction

The Nigerian Famfa oil case illustrates the concept of transparency in the management of hydrocarbon blocks and the effects when it falls short[183]. To further appreciate the importance of transparency, it is important to look at other global comparators and best practices espoused in other civilizations[184]. This will serve as a yardstick in auditing the Kenyan legal and policy framework and mirroring it against some of the time-tested practices in other traditions and in turn evaluate the viability of the new Kenya's legal framework in realizing the potential and translating mineral wealth to economic growth.

Having a transparent licensing regime on oil and gas blocks can help a country avoid avenues of corruption and conflict between the community and the IOC and/or the Government

This sub-topic on comparative analysis will look at the best global practice in the Republic of Ghana. The jurisdiction has been chosen mainly because the law as it is in Kenya today has substantial similarity to that of the United Kingdom and therefore an easy comparator as the United Kingdom is considered advanced in the hydrocarbon realm. Furthermore, the United Kingdom is the largest oil producer in the European Union and the second largest producer

[183]C. J. S. Azoro, National Participation in Nigerian Oil and Gas Industry: Prospects and Challenges, *Petroleum Technology Development Journal* (ISSN 1595-9104): An International Journal; January 2016 - Vol. 6 No. 1, 91.
[184]C. J. S. Azoro, National Participation in Nigerian Oil and Gas Industry: Prospects and Challenges, *Petroleum Technology Development Journal* (ISSN 1595-9104): An International Journal; January 2016 - Vol. 6 No. 1, 91.

within the European Economic area after Norway[185]. Kenya therefore, being a budding and potential oil-producing nation, has a lot to learn from the United Kingdom as it lays down the legal framework for licensing and management of hydrocarbon blocks.

Ghana, on the other hand, has taken over the British standard and customised it to fit its sector. It is one of the few African countries credited with entrenching transparency initiatives in its extractives sector and further offering an ideal case study where transparency has facilitated access to data in therefore contributing to accountability by the government and the extractive companies. Ideal case studies demonstrate the importance of transparency in sealing revenue leaks and pointing out administrative flaws in hydrocarbon rights.

4.8.3 Republic of Ghana

Ghana is one of the African countries that have entrenched transparency and publicly availed oil contracts to the public.[186] The law in Ghana requires a public register to be maintained on petroleum agreements, permits and authorisations.[187] This entrenched transparency has led to public interest and accountability groups calling for accountability for revenue generated and has developed a model for African nations.[188] This has been crucial in taming corruption and entrenching transparency and accountability by providing level ground for transparency advocacy and other avenues i.e. investigative journalism.[189]

Just like Kenya and the United Kingdom, all minerals in Ghana belong to the people of Ghana and vest in the president in trust for them.[190] The Republic of Ghana is further divided into oil blocks/basins that are available for allocation to exploration firms.[191] Ghana is a member of the Extractive Industries Transparency Initiative (EITI) which is an organisation that encourages

[185]Greg Gordon, 'Petroleum Licensing', in Greg Gordon, J. Paterson and E. Usenmez, *Oil and Gas Law: Current Practice and Emerging Trends*, 2nd ed. (Dundee University Press, Dundee, 2011), p. 65

[186]The World Bank Group, The World Bank Group in Extractive Industries, 2015 Annual Review, Washington, DC 20433 USA, 30.

[187]Section 56, *Petroleum (Production and Exploration) Act*, 2016.

[188]Global Witness, *Blue Print for Prosperity: How South Sudan New Laws Hold the Key to a Transparent and Accountable Oil Sector*, November, 2012, 13.

[189]Andy McDevitt, Transparency and Accountability Initiatives in the extractive Sector, K4D, Knowledge, Evidence and Learning for Development, 2017.

[190]Article 257(6) of the *Ghanaian Constitution* of 1992.

[191]Section 6, *Petroleum (Exploration and Production) Act*, 2016 (Act 919).

government, extractive companies, international agencies and NGO's to work together to develop a framework to promote transparency of payments in the extractive industries.[192] These developments have led Ghana to the arena where it is regarded as a key player in the transparency initiative in the extractives sector.

Ghana's extractive sector dates back to the 1980s when the *Ghana National Petroleum Corporation Act*, 1983 was enacted. The Act established the National Petroleum Corporation to champion and undertake upstream petroleum exploration and development.[193]*The Petroleum Income Tax Law*1987 (PNDCL 188) was further passed to regulate taxation in the upstream hydrocarbon sector.[194] With the oil boom characterised by the discovery of commercially viable oil deposits in 2009, the *Petroleum Commission Act*, 2011 (Act 821) was enacted to create the Petroleum Commission as an independent regulator in the upstream sector in accordance with the 1992 Constitution. What followed thereafter were a couple of legislations to modernise its regulatory framework. The P*etroleum Revenue Management Act*, 2011 (Act 815) was enacted to lay the framework for management of oil revenues, and the *Petroleum (Exploration and Production) Act*, 2016 (Act 919) (the E&P Act) was also enacted to replace the *Petroleum (Exploration and Production) Law*, 1984 (PNDCL 84) which was the primary legislation within the Ghanaian upstream oil sector.

In licensing of hydrocarbon blocks to explorative firms, the Ghanaian system has adopted a hybrid system whereby the licence is given to the corporation that is most technically fit and also one that has proved that it can meet the safety and environmental standards. The P*etroleum Revenue Management Act*, 2011 (Act 815) further establishes the Public Interest and Accountability Committee (PIAC) to ensure transparency and compliance with accountability in managing oil wealth and ensuring that the people of Ghana get the best of the mineral wealth.

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[192] See: The global standard for the good governance of oil, gas and mineral resources: Extractive Industries Transparency Initiative (EITI) available at <https://eiti.org/who-we-are> accessed on 20th December, 2018.
[193]*Ghana National Petroleum Corporation Act*, 1983 (PNDCL 64), Sections 1, 2.
[194]*Petroleum Income Tax Law* 1987 (PNDCL 188) – enacted pursuant to the provisions of the *Provisional National Defense Council (Establishment) Proclamation*, 1981.

4.8.4 Transparency Measures in Management of Hydrocarbon Blocks

The *Petroleum (Exploration and Production) Act*, 2016 (Act 919) is the primary Ghanaian statute governing the licensing of hydrocarbon blocks in Ghana.[195] The Act, like the United Kingdom standard, empowers the Minister to develop regulations on safe construction, health and safety, product standard, reference maps for oil blocks, competitive bidding and terms and conditions of petroleum agreements. Section 10 (3) provides that a petroleum licence is granted only after a fair competitive process.

The award of hydrocarbon blocks is further regulated and guided by the *Local Content and Local Participation Policy in Petroleum Activities* which is a policy framework requiring operators, when advertising employment, to give preference to Ghanaians who have the requisite qualification, competence and experience, in all operations, including the award of oil blocks, oil field licenses, drilling, oil-lifting licences, aviation, transportation, and catering.[196] This is crucial in ensuring that the local populace feel that they are part of the system in turn promoting transparency in licencing of oil blocks. Ghana is one of the few African countries known to disclose its contracts on hydrocarbon blocks and explorative excursions and it has consequently ranked higher in the Resource Governance Index (RGI).[197]

Historically, just like Kenya, exploration licences and licensing of hydrocarbon blocks in Ghana were awarded through an Open Door Direct Negotiation Process.[198] This system was however criticised as it was shrouded in mystery and corruption and inherently opaque. Since then, there has been a shift to a more transparent process especially after the discovery of massive oil deposits on the Jubilee Fields and the rise of the commercial viability of the extractive industry especially oil and gas.[199] This has been coupled by aturn around effort to make Ghana's Governance structures transparent.[200]

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[195] Section 1, *Petroleum (Exploration and Production) Act*, 2016 (Act 919).

[196] World Trade Organisation, Trade Policy Review: Report by the Secretariat – Ghana, WT/TPR/S/298, 9, 79.

197 Resource Watch Institute, *The 2013 Resource Governance Index: A Measure of Transparency and Accountability in the Oil Gas and Mining Sector*, 14. At <www.revenuewatch.org/rgi> on 3rd January, 2019.

[198] Katharina Neureiter and Nick Travis et al, Mineral Rights to Human Rights: Mobilising Resources from the Extractive Industries for Water, Sanitation and Hygiene (Case Study, Ghana), *WaterAid*, 2017, 20.

[199] ADO, R. 2016. Accounting, accountability and governance in upstream petroleum contracts: the case of local content sustainability in the Nigerian oil and gas sector. Robert Gordon University, PhD thesis. Held on OpenAIR [online]. Available from: https://openair.rgu.ac.uk

[200] Tutu Benefoh, Daniel & Ackom, Emmanuel, Energy and low carbon development efforts in Ghana: institutional arrangements, initiatives, challenges and the way forward, 2016, *A I M S Energy*, 4(3), 481-503. DOI.

The *Petroleum (Exploration and Production) Act* further provides for the baseline terms of the essential terms of a contract that must be present in a licence/contract to oil prospecting firms. It also includes the minimum work requirements that a licensee must perform in order for its licence to be renewed.[201] The Act also encompasses reporting standards on the findings and appraising the Commission on their activities as a way of promoting transparency.

4.8.5 Salient Features in Management of Oil Blocks in Ghana

The *Petroleum (Exploration and Production) Act*, 2016 under Section 10(14) provides for the right of the Ghana National Petroleum Corporation (GNPC) to hold an initial participating interest of at least 15 per cent for exploration and development. This comes at the initial stages of the excursion. This is distinguished from the Nigerian concept of back-in-rights which come up at a later stage when the exploring firm has already recouped its expenses in prospecting and research expenses.

The Act at section 25 further provides for the reporting and appraisal of the prospecting company of any oil fields by the authority as the case may be[202]. The aim of this has been the monitoring of activities of the extractive firms and minimising revenue leakages as well as promoting transparency which is the core objective under section 4 of the Act[203]. Such information is in turn made applicable to the public and other authorities as may be necessary to monitor the activities of the extractive firms.

The GNPC further has the option of acquiring an additional participating interest as determined in the petroleum agreement within a specified period of time. The pre-emptive right of the Ghanaian National Petroleum Corporation is unfettered and can acquire participating interest in the excursion in order to maximise the benefit for the Ghanaian people and to ensure that the citizenry benefits from the depletion of the country's non-renewable resources[204].

In summary, the petroleum agreement entered into between the prospecting firm and the government must be for a term not exceeding 25 years subject to the ability of the Minister to

[201] *Petroleum (Exploration and Production) Act*, 2016, Section 23.
[202] *Petroleum (Exploration and Production) Act*, 2016, Section 25
[203] *Petroleum (Exploration and Production) Act*, 2016, Section 5
[204] Tutu Benefoh, Daniel &Ackom, Emmanuel, Energy and low carbon development efforts in Ghana: institutional arrangements, initiatives, challenges and the way forward, 2016, *A I M S Energy*, 4(3), 481-503. DOI.

extend. This ensures that a single entity does not hold on to a licence for far too long and further to enhance transparency and accountability. The law in Ghana also requires that a change of ownership of the contracting party is subject to the consent of the Minister or Commission, and the GNPC has the pre-emptive right to acquire the interest of contractors[205].

4.9 Conclusion

From the analysis of the two comparative jurisdictions, valuable lessons can be learned and incorporated into Kenya's system in a bid to promote transparency in oil block licensing. First, from the Ghanaian model where the Ghanaian National Petroleum Corporation gets an initial carried interest of 15% hence ensuring the state through the corporation gets to participate and benefit from the state resources directly as a shareholder. In Kenya, the National Oil Corporation is a similar candidate that can be allowed to have a stake in each of the oil exploration expeditions and hence increasing government revenue.

From the UK model, the publication of oil licence and contracts is a key concept that the Kenyan model should emulate. The Government of the Republic of Kenya has been known to keep confidential information relating to oil contracts and licences. The UK system, on the other hand, has published such contracts which are freely accessible to the public. The same applies to Ghana which as has been demonstrated herein has managed to entrench contract transparency and governance by making the contracts freely available to the public. Kenya is therefore encouraged to model its system along with the open access initiative and further join the Extractive Industries Transparency Initiative (EITI).

The UK system has further entrenched its fundamental terms and conditions that must be present in each licence/contract such that parties limit the negotiation to the physical location of explorative blocks. This offers an incentive against keeping the contents of a contract confidential. Even as Kenya enacts laws that reflect the newfound status as an oil producing nation, it should consider entrenching the suitable terms and conditions in the statute. This is crucial in ensuring that some contractual clauses on confidentiality do not defeat the concept of

[205] Katharina Neureiter and Nick Travis et al, Mineral Rights to Human Rights: Mobilising Resources from the Extractive Industries for Water, Sanitation and Hygiene (Case Study, Ghana), *WaterAid*, 2017, 20.

transparency. This can be defeated by overriding the confidentiality clause through statute or subsidiary regulation.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0. Introduction

The main import of this chapter is to highlight the sum purpose of this research and its findings. It pulls together the similar experiences as well as the illuminating factors that will in turn aid Kenya's growing oil and gas sector and guide discussion and framework into the best policy, legal and regulatory structure and the latent or patent flaws thereon.

The total of all this is to contribute to a market that operates optimally, rewards efficiency and innovation and in turn, leads to efficient distribution of wealth.[206] As Robert Jennings postulates 'the main purpose of academic writing should be to perceive and portray patterns and relations in a body of legal rules to make it manageable, teachable, comprehensible and usable.'[207] This chapter hopes to remain true to that noble task and to offer plausible solutions and recommendations to pertinent questions that Kenya's oil and gas sector continues to grapple with.

5.1. Conclusion

Crystallising from the research herein, taking into account the fact that the Kenyan oil and gas legal regime is in transition following the enactment of the new *Energy Act* and the *Petroleum Act*, much is cast to speculation as to its effectiveness. However, it is worthy to note that the legal and policy parameters as enacted by parliament offer a positive shift inclined towards transparency, better information access and inclusivity. As seen in chapter two, there is now an established data collection centre that ensures the centralisation of information relating to oil and gas. This is in line with the global best practice of information access, disclosure and availability. The data centre will also be instrumental in growing the database and ensuring the integrity of the data for better financial planning and policy formulation in the oil and gas sector.

[206]Philip Sutherland & Katharine Kemp, Competition Law of South Africa (2014) at 1-67. 68.
[207]Roberts Jennings Q C, in his foreword to Philippe Sands and Ruth Mackenzie, *Principles of International Environmental Law* (3rd Ed 2012) 21.

With the benefit of hindsight, however, and the comparative jurisprudence herein in the case of Famfa Oil Limited, the implication of a weak link in a system cannot be gainsaid. The Famfa Oil case herein has offered a critical glimpse at the effect of administrative law. Kenya, in this case, is no exception. The *Petroleum Act*, still vests substantive powers in the Cabinet Secretary and the potential for abuse cannot be overlooked. As was observed in the Famfa Case, the need for safety valves in ensuring that a state is not in limbo when it comes to deriving benefit from its resources can only be found in a sound system with adequate security and safeguards to prevent the potential abuse of power.

The above conclusion and findings are further stressed by the fact that there is no precise set mechanism for conducting the bidding rounds. The current law enacted merely provides for competitive bidding in the allocation of licence blocks to exploration firms. There is no legally laid procedure or the criteria for determining the responsiveness or otherwise of a bid. This may justify the arbitrary exercise of power by the Cabinet Secretary as it widens his discretion. This poses a significant challenge that in some circumstances may be susceptible to abuse. This should be addressed at the backdrop that the upstream oil and gas sector now has an independent regulator, the EPRA. The delimitation of functions between EPRA and the Cabinet Secretary thus needs to be relooked, so that the independent regulator is not reduced to a mere conveyor belt for ministerial fiat.

In the conclusion segment of chapter three, the research buttressed the import of "back – in – rights" as observed in other jurisdictions such as Nigeria and the United States.[208] Kenya has not in its new dispensation hinted to such an approach to increase the benefit from natural resources. This approach can, therefore, be borrowed and chiselled into law to ensure that the state derives maximum benefit from the depletion of its non – renewable resources.

This thesis has thus shown that international best practice on transparency in bidding and licensing rounds demand that a clear and well-laid procedure with adequate safeguards and checks and balances is essential in achieving transparency and effectiveness in the sector. A holistic review of the Kenyan laws herein, however, shows that even though improvements have been made with the enactment of the new laws, they still fall short of some key aspects of

[208] Supra note 178 and 179.

international standards. The recommendations herein will thus come in handy to cure such flaws and improve on the system.

5.2 Recommendations

The conclusions above demonstrate that Kenya's budding oil sector has a lot to learn and a myriad of challenges to grapple with. With the benefit of hindsight, however, taking the experience, challenges and successes of other jurisdictions, the recommendations herein are therefore a culmination of experiences and lessons learnt from other jurisdictions. The recommendations are as follows:

5.2.1 Amend the *Petroleum Act,* 2019 to clearly define the procedure and parameters governing bidding rounds

The need for a clearly defined procedure and parameters for conducting a bid, licensing or renewal is evident from the Famfa Oil Limited case pitting it against the Nigerian National Petroleum Corporation. Technical flaws or lack of clarity in a system or the law can be costly and fatal.

5.2.2 Truncate the powers of the Cabinet Secretary to limit and define circumstances in which s/he may unilaterally negotiate with an extractive firm in the absence of a responsive bid

Under the newly enacted *Petroleum Act, 2019,* the Cabinet Secretary in charge of Mining and Petroleum still retains considerable powers in negotiating petroleum agreements. As has been proven by the Famfa Oil case study, such powers are prone to abuse. This anomaly coupled with the fact that the procedure for conducting a bidding round is not stipulated adds to the flaw. The Act provides that the Cabinet Secretary can enter into direct negotiations with an extractive firm where no bid is received or where the bids are not responsive. There is a latent danger in this model as the big industry players have been known to pay off small players in what has been termed as "pay for delay". This anti-trust practice locks out competitive bids leaving only the key player who has paid off other parties to negotiate with the Cabinet Secretary.

The flaw therefore is a threat to the vision of achieving transparency in the licensing system, bidding and management of hydrocarbon blocks. The proposal of this research, therefore, is an

amendment to the Act to ensure that the circumstances in which the Cabinet Secretary can negotiate directly with an extractive firm is stringent and subjected to scrutiny to weed out anti-trust practices. This will go a long way in sanitising the system and reducing the possibility of abuse of the powers currently vested in the Cabinet Secretary. This will avert the arbitrariness observed in 1993 during the grant of exploration licences to Famfa Oil Limited and other players during the Nigerian military rule.

5.2.3 Transfer the Power to Directly Negotiate to an Independent Body

The sum finding of the potential flaws and latent dangers of concentrating power in a single individual i.e. the Cabinet Secretary points to the need for transfer of power. This research, therefore, postulates that as an alternative of truncating the power of the Cabinet Secretary on the circumstances in which he can negotiate independently. The power to negotiate should be transferred to the Energy and Petroleum Authority which has the necessary powers and expertise on oil and gas. Further, the Authority is made up of a number of experts and therefore there is collective reasoning and promotion of justice and inclusivity as opposed to concentrating powers in a single individual who can engineer the desired result or act *ultra vires* with no repercussions. Further, vesting the power to negotiate will place any appeals from the decision of the authority on the Tribunal which is equally constituted of persons with expertise in oil and gas.

5.2.4 Legislation to introduce "Back – in – rights" in Kenya

From the research, it can be deduced that it is in the interest of a country as the trustee of a people's non-renewable resources to ensure that they benefit from its depletion. As observed, the Nigerian perspective of "Back-in-rights" and its implementation thereof in other jurisdictions like the United States point to a good concept. The rights have aimed to ensure that the nation reaps maximum benefit from the depletion of its resources. This is often after the extractive firms have recouped their costs used in exploration and prospecting for oil.

In the preliminary stages of this research, it was observed that due to lack of technical capacity in oil exploration, the government often places reliance on multinational corporations to conduct explorations. Without such rights under the Kenyan law, the government has no substantive means of benefiting directly from oil exploration. It is, therefore, the recommendation of this research that the law be amended to allow the National Oil Corporation to have back-in-rights

after the multinational corporations have recouped their costs expended in exploration and prospecting. This will be instrumental in increasing the benefit that is derived from the people of Kenya.

5.2.5 Chiselling terms of Licence into Statute to Weed out Independent Negotiations

As witnessed in the case of the United Kingdom and Northern Ireland, the terms of a petroleum licence are set out in statute. This, therefore, means that all the players are subjected to a single standard and parties are not free to negotiate independent terms away from those laid in statute. This anti-deviation stance is what promotes transparency and diffuses the incentive to keep petroleum contracts or information relating to petroleum secrets. This in turn promotes transparency and accountability among actors in the petroleum rights and management realm.

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